TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. ~~168~~ 13.

ILLINOIS CENTRAL RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

J. U. McKENDREE.

IN ERROR TO THE CIRCUIT COURT OF CARLISLE COUNTY, STATE OF KENTUCKY.

FILED JANUARY 25, 1905.

(19,615.)

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1 Pleas before the Honorable R. J. Bugg, Judge Carlisle, circuit court, Carlisle county, Kentucky, at its October term, thereof, in the year of our Lord one thousand nine hundred and four.

Be it remembered that on the 5th. day of February, 1904, the plaintiff, J. U. McKendree came by his attorneys, J. M. Nicols & Son, and Wickliffe & Wiley and filed in the clerk's office of the Carlisle circuit court his petition against the Illinois Central Railroad Company and ordered summons to issue on *siad* petition which was done accordingly, and said petition is in words and figures as follows, to-wit:

"The plaintiff, J. U. McKendree, says that the defendant, Illinois Central Railroad Company, are a corporation, duly incorporated under the laws of the State of Illinois, and permitted to sue and be sued, and plead and be pleaded and enjoy any and all legal rights that a natural person enjoys, and that they are running and conducting railroad through*t* Carlisle county, and that on the 11th. day day of July, 1903, they received for transportation one car or more of infected cattle, and transport*ated* them into the town of Arlington. And on the 13th. day of July, 1903, unloaded said infected cattle in said town, placing them in stock pens in said town where cattle running on the commons where they had a right to run, could and did come in contact with said infected cattle and contracted infection, Texas cow fever, and that the defendant knew or could have known with reasonable care that said cattle did have infect*u*ous germs when they unloaded said infected cattle, they having brought them from an infected district, knowing and in open conflict with well known quarantine laws and while said infected cattle
2 was so held by defendant in said stock pens, the defen*e*ant's cows came in contact with said infected cattle and contracted said Texas cow fever and died, to plaintiff's great damage, to-wit: Eighty dollars, ($80.00).

Wherefore, plaintiff prays for judgment for eighty dollars, and all other proper relief."

"J. U. McKENDREE."

"Sig*h*ed and sworn to by J. U. McKendree, before me, this the — day of February, 1904."

"J. C. FORD, J. P. C. C."

(Endorsed:) "Filed, summons and one copy issued, Feb'y 5" 1904. B. T. Huey, cl'k, by Lee T. Tayler, D. C."

3 *Siad* summons which was issued on the foregoing petition is in words and figures as follows, to-wit:

"Commonwealth of Kentucky to the sheriff of Carlisle county, Greeting:

"You are commanded to summon Illinois Central Railroad Company, to answer in 10 days after the service of this summons, a petition filed against it in the Carlisle circuit court by J. U. McKendree and warn it that upon failure to answer, the petition will be taken for confessed, or it will be proceeded against for contempt, and you will make due return of this summons within 10 days after the service thereof to the clerk's office of said court."

"Witness B. T. Huey, clerk of said court, this 5th. day of February, 1904.

"B. T. HUEY, Clerk,
"By LEE T. TAYLOR, D. C."

Be it further remembered that said summons was placed in the hands of J. Willingham, sheriff of Carlisle county, to do execution thereon, and the same was returned in to said above named office with the following return thereon, to-wit:

"Exec-ted by delivering a true copy of the -in summons to John Faffany the Illinois Central Railroad Company's agent at Bardwell, Ky., Feb'y, 5th. 1904.

"J. WILLINGHAM, S. C. C."

4 Be it further remembered that on the 15th. day of February, 1904, the following order was made herein and the same is in words and figures as follows, to-wit:

"Ordered that the above sase be, and the same is set down for trial on Tuesday, the 8th. day of this term of the court."

Be it further remembered that on the 19th day of February, 1904, the following order was made herein and the same is in words and figures as follows, to-wit:

"This day came defendant by attorney and filed demurrer to the petition herein."

And said demurrer is in words and figures as follows, to-wit:

"The defendant demurrers generally to the petition herein and to each part of same, for the reason it does not state facts sufficient in law to constitute a cause of action against it."

"ROBBINS, THOMAS & BRIDGWATER,"
"Per Att'ys."

(Endorsed:) "Filed, Feb'y 19" 1904, B. T. Huey, cl'k."

5 Be it further remembered that on the 23rd. day of February, 1904, the following order was made herein and the same is in words and figures as follows, to-wit:

"The demurrer filed herein to plaintiff's petition coming on to be heard, and the court being advised, overruled said demurrer, to which defendant excepts; then came defendant and filed answer

herein, and the affirmative allegations of said answer is controverted of record by plaintiff, and this case is continued."

Said answer above filed to plaintiff's petition is in words and figures as follows, to-wit:

"The defendant not waiving its demurrer to the petition, denies that it brought the car load of cattle complained on from any infected district, knowing or otherwise, or that it so brought them against or in conflict with any quarantine laws, and it denies that said cattle was infected, and it denies that it knew or could have known with the use of reasonable care, at any time that any of said cattle had infectuous germs, it has no knowledge or information sufficient to form a belief as to whether either of plaintiff's cows contracted the disease from which they died from any of said cattle, or as to whether they were worth eighty dollars or any more than thirty dollars.

And it denies that by any act of it, it has damaged plaintiff in the sum of eighty dollars or part of it.

Wherefore it prays to be dismissed with its cost and all proper relief."

"ROBBINS, THOMAS & BRIDGWATER, Att'ys."

[Endorsed:] "Filed, Feb'y 23rd. 1904, B. T. Huey, cl'k, by Lee T. Taylor, D. C."

6 Be it further remembered that on the 8th. day of June, 1904, the following order was made herein and the same is in words and figures as follows, to-wit:

"This day came defendant by attorney, and produced to the court and filed amended answer herein."

And said above amended answer is in words and figures as follows, to-wit:

"The defendant would amend its answer herein by adding thereto the following, which was mistakingly omitted, viz:

Further answering herein, the defendant says that the claims of the plaintiff herein asserter are based upon a certain alleged act of Congress of the United States of America approved February 2, 1903, 'entitled an act to enable the Secretary of Agriculture to more effectually suppress and prevent *and prevent to* spread of contageous and infectuous diseases of live stock and for other purposes' which act is published and contained in volume 32 United States Statutes at Large beginning at page 791 and also in a supplement to the United States compiled statute issued in 1903, by the West publishing company, St. Paul, Minn., beginning at page 372 of said volume, and said claims are further based upon certain alleged regulations adopted and promulgated by the Secretary of Agriculture on March 13, 1903, pursuant to the authority attempted to be conferred upon him by said alleged act of Congress above mentioned approved February 2, 1903.

The defendant says that said act of Congress herein before men-

tioned and said regulations adopted by the Secretary of Agriculture as hereinbefore stated are each and all of them repug-
7 ent to and in contravention of the Constitution of the United States of America and is -n excess of the powers of Congress and of the Secretary of Agriculture under the Constitution of the United States and they are each and all, therefore, unconstitutional and void, and under the Constitution of the United States this defendant has the right, pricilege and immunity of being exempt from the assertion or prosecution of any claims against it based upon or arising under such act of Congress or said regulations or any of them, and this defendant as permitted by section 709, of the Revised Statutes of the United States hereby specially sets up and claims and pleads in defendse of this action the right and privilege and immunity which is secured to it by the Constitution of the United States to be exempt from all suits and prosecutions and all claims against it based upon or arising under such unconstitutional and void act of Congress and regulations adopted or promulgated by the Secretary of Agriculture.

"Wherefore having fully answered herein defendant prays to be hence dismissed with its cost."

"ROBBINS, THOMAS & BRIDGWATER, Att'ys."

"Gus Thomas says he is agent and att'y for def't, the chief officers of which are absent from Carlisle county, and he believes above statements are true."

"GUS THOMAS."

"Subscribed and sworn to before me by Gus Thomas, June 8, 1904."

"J. E. BRIDGWATER,"
"Ex. for C. Co."

(Endorsed:) "Filed June 8", 1904. B. T. Huey, cl'k."

8 Be it further remembered that on the 10th day of June, 1904, the following order was made herein and the same is in words and figures as follows, to-wit:

"This day came plaintiff by attorney and produced to the court and filed demurrer to the amended answer herein."

And said demurrer is in words and figures as follows, to-wit:

"The plaintiff demurs generally to defendant's amended answer herein for the reason that it does state facts in law sufficient to constitute a defense in it.

"BY ATT'YS FOR PL'F'T."

(Endorsed:) "Filed June 10" 1904. B. T. Huey, cl'k."

9 Be it further remembered that on the 15th. day of June, 1904, the following order was made herein and the same is in words and figures as follows, to-wit:

"This day came plaintiff by attorney and filed amended petition nd by agreement of parties the affirmative alligations of said mended petition are controverted of record by defendant."

And said aman-ed petition filed herein by plaintiff is in words and gures as follows, to-wit:

"The plaintiff, J. U. McKendree comes and by leave of the court mends his petit-on and says, that the defendant, Illinois Central Railroad Company on the 13th day of *Jouym* 1903, received one car f cattle at Grand Junction, Tenn. to be transported to the town of Arlington, Ky., and on the 13th. day of said month unloaded them n the stock pens in *siad* town.

That the town of Arlington is a small town located on defendant's oad in this, Carlisle county, and defendant's stock pens are located djacent to the public highway, and commons, and that Grand unction, Tenn. is located on defendant's road and south of the uarantine line that was established on the 14th. day of March, 1903, y and under the existing quarantine laws, and that said quarantine line 'beginning on the Mississippi river at the south east corner f the State of Missouri at the western boundary of Tennessee; hence southerly along the western boundaries of the counties of Dyer and Lauderdale thence following the main channel of the Mississippi river; (leaving Island # 37, to the north and west) to the north west corner of Shelby county on the Mississippi river; thence easterly along the northern boundary of Shelby county and Fayette county, to the south west corner of Haywood county; thence northerly and easterly along the western and northern boundary lines of Haywood to the northeastern corner of said county; thence easterly along the northern boundary line of Maddison county to the south west corner of Carroll county; thence northerly and easterly along the western and northern boundary lines of Carroll to the north east corner of said county; thence southerly along the eastern boundary of said county to its intersection with N. C. & St. L. railway; thence easterly along the middle of said N. C. & St. L. railway through Benton county to the intersection *of* with the Tennessee river at the eastern boundary of Benton county; thence south along the lines of Benton county, and Decatur county to the north west corner of Wayne and Lawrence county to the north eastern corner of Lawrence county; thence south along the eastern boundary of Lawrence county to the south east corner thereof; thence east along the southern boundary of Giles county to Elk river; thence north westerly along said river through Lincoln and Giles counties to the eastern boundary of Lincoln county; thence north-ly and easterly along the western and northern boundaries of Moore county to the north east corner of Moore county thence north along the west boundary lines of Coffee and Cannon counties to the north west corner of Cannon county; thence north easterly and south easterly along the northern and eastern boundaries of Cannon county to the boundary of Warren county; thence easterly along the northern boundary of

Warren county to the western boundary of White county; thence north easterly and south easterly along the western and northern boundaries of White county to the western boundary of Cumberland county; thence southerly, easterly, and north easterly
11 along the southern and eastern boundaries of Cumberland county to the northern corner of Rhea county; thence southerly along the eastern boundary lines of Rhea and James counties to the north west corners of Bradley county; *B*hence northerly and south easterly along the northern boundary lines of Bradley and Polk counties to the south east corner thereof at the south western corner of the State of North Carolina. And that the defendants received said cattle south of said quarantine line, and transported them north and out of a quarantine district, and south of the said quarantine line and transported them north through the State of Tennessee, into this county and State, and unloaded them in the town of Arlington and placed them in their stock pens adjacent to the public highway and commons where plaintiff's cows came in contact with the germ of Texas cow fever, that said cattle had on them when put in the pens as aforesaid, that said stock pens — suffered and permitted to remain open and exposed to cattle after the removal of said cattle without disinfecting, or any other effort to protect exposed stock, and plaintiff's cows contracted Texas cow fefer from said germs produced from said cattle while in said stock pens, to the damage of plaintiff.

Wherefore he prays as in his original petition."

"NICHOLS & SON,
"WICKLIFFE & WILEY,
Att'ys for Plaintiff."

(Endorsed:) "Filed June, 15" 1904. B. T. Huey, cl'k."

12 Be it further remembered that on the 16th. day of June, 1904, the following order was made herein and the same is in words and figures as follows, to-wit:

"Ordered that this case be continued."

Be it further remembered that on the 24th, day of October, 1904, the following oreder was made herein and the same is in words and figures as follows, to-wit:

"The demurrer heretofore filed to amended answer coming on to be heard and the court being advised on same, sustained said demurrer, to which defendant excepts; then came the parties and announced ready for trial, and issue being joined, came the following jury, to-wit: Mug Page, G. W. Vallandingham, F. S. Petrie, Simon Rowland, F. H. Harper, Mont Stratton, D. W. Harper, W. H. Wilson, J. L. Copeland, Richard Boyd, W. B. Fisher, & F. P. Leath, who were sworn to try the issue and on motion of defendant, C. B. Crossland, this court's official stenographer is directed to take the proof in this case, and the *and the* evidence herein being heard, the defend-

ant offered instruction, "A" and moved the court to give said instruction "A" to the jury to which plaintiff objected and the court being advised sustained said objections and refused to give same to which defendant excepts; then came defendant and offered instruction "B," and moved the court to give said instruction to the jury to which plaintiff objects and the court being advised, overruled said objections and gave same to the jury, to which plaintiff excepts; then the court on its own motion gave instructions # 1 & 2,

13 to the jury to which both plaintiff and defendant excepts and the argument of counsel having been heard, the case was finally submitted to the jury and they retired to their room for deliberation and returned into court the following verdict, to-wit:

"We, of the jury, find for the plaintiff in the sum of sixty-five dollars."

F. S. PETRIE.
W. H. WILSON.
W. B. FISHER.
S. I. ROWLAND.
G. VALLANDINGHAM.
F. H. HARPER.
J. L. COPELAND.
RICHARD BOYD.
MUG PAGE.
F. P. LEATH.
MONT STRATTON.

Be it remembered that on the 24th day of October, 1904, the following judgment was rendered herein on the above verdict of the jury, and said judgment is in words and figures as follows, to-wit:

"In view of the foregoing verdict, it is the judgment of the court that the plaintiff, J. U. McKendree do recover of defendant, Illinois Central Railroad Company, the sum of sixty-five ($65.00) dollars, with interest from October, 24th, 1904, and his cost herein and that *fi. fa.* do issue."

14 Be it further remembered that on the 24th day of October, 1904, the following order was made herein and the same is in words and figures as follows, to-wit:

"This day came defendant by attorney and produced to the court and filed reasons and entered motion and moved the court to set aside the verdict and judgment had herein and grant it a new trial."

And said reason- for new trial are in words and figure- as follows, to-wit:

"The defendant, Illinois Central Railroad Company, comes and moves the court to set aside the verdict and judgment rendered thereon, and grant it a new trial herein because said verdict is against the evidence and is contrary to the evidence, and the verdict is not sustained by sufficient evidence, and is contrary to law, and,

Second. Because of errors of law occurring at and during the trial and progress of the same and all and each of which were excepted to at the time and to which it still excepts in this;

That the court erred to the substantial prejudice of defendant in sustaining the demurrer of plaintiffs to the amended answer of defendant, and erred to the substantial prejudice of defendant in admitting to the jury over the objections of the defendant, the alleged attached copy of the orders of quarantine issued by the Secretary of Agriculture of the United States, the defendant contending that the same was not properly or legally proven, and also erred to the substantial prejudice of defendant in admitting *to the* over the objections of defendant all evidence as to the plaintiff's premises and Rob't Brown's premises having been quarantined by any one or by any authority, and erred in admitting other evidence to the jury, offered by plaintiff over the objections of defendant, and erred to the substantial prejudice of defendant in giving to the jury instructions Nos. 1 & 2, by the court over the objections of defendant and to the giving of each of which the defendant excepted at the time; and the court erred to the substantial prejudice of defendant in refusing to give to the jury instruction "A," offered by defendant, to which ruling of the court the defendant excepted and still excepts by reason of all of which this defendant has not had a fair or impartial trial."

"ROBBINS, THOMAS & BRIDGWATER,
Attorneys for Defendant."

(Endorsed:) Filed Oct. 24" 1904. B. T. Huey, cl'k.

Be it further remembered that on the 25th day of October, 1904, the following order was made herein and the same is in words and figures as follows, to-wit:

"The motion entered heretofore herein asking for a new trial coming on for hearing and the court being advised, overruled said motion to which defendant excepts."

Be *ti* further remembered that on the 4th day of November, 1904, the following order was made herein and the same is in words and figures as follows, to-wit:

"This day came the defendant by attorney and filed bills of exception, Nos. 1 & 2, duly signed by the judge of this court and made a part of this rocord. The defendant also files a copy of bill of exceptions No. 1, to be used in making out this record."

And said bill of — No. 2, is in words and figures as follows, to-wit:

"Be it remembered that at the trial of this cause the defendant at the close of the evidence for the plaintiff offered and moved the court to give to the jury instruction "A," in words and figures as follows, to-wit:

"The court instructs the jury to find for the defendant."

"Refused."

But the court overruled said motion and refused to give to the *the* jury said instruction "A," to which the defendant ex-
17 cepted, and court on its own motion gave to the jury instructions Nos. 1 & 2, (No. 1) in words and figures as follows:

"The court instructs the jury that if they believe from the evidence that the cattle shipped to Arlington, Ky., from Grand Junction Tenn. by J. A. Jones through the defendant, Illinois Central Railroad Company, were infected with the disease known as Texas fever and that through and by reason of such disease if any of said Jones' cattle, the two cows of plaintiff were infected and died therefrom, then you will find for plaintiff the reasonable cash calue of said two cows, noy exceeding the sum of eighty dollars."

"Given"

(No. 2.), in words and figures as follows:

"The court instructs the jury that unless you believe from the evidence plaintiff's cows caught an infectuous disease from the Jones cattle and died therefrom, the law is for the defendant and you should so find, although you may further believe from the evidence that the Jones cattle had the infectious disease known as Texas fever."

"Given."

To the giving of which defendant objected and excepted.

And the court on the motion of defendant gave instruction "B" to the jury which is in words and figures as follows:

"The court instructs the jury that they cannot find for plaintiff unless the cattle shipped by J. A. Jones over defendant's railroad and unloaded at Arlington had Texas fever or Texas ticks; nor can the jury find for poaintiff, alt-ough they may believe said Jones' cattle were infected by Texas fefer or Texas ticks, unless they fur-
ther believe that plaintiff's cattle contracted the disease from
18 said Jones' cattle, while the latter were in the pens of defendants at Arlington."

"Given."

To the giving of which the plaintiff objected and excepted and these were all the instructions offered, given or refused at the trial of this case.

Be it further remembered that all the evidence offered heard or refused in this case is set out in bill of exceptions No. 1, filed herein by defendant, and both it, and this is a true and correct bill of exceptions."

"R. J. BUGG, Judge."

(Endorsed:) "Filed Nov. 4" 1904. B. T. Huey, cl'k."

19 Be it further remembered that on the 23rd day of December, 1904, the following certificate was filed in the clerk's office of the Carlisle circuit court, which certificate was duly signed by Hon. R. J. Bugg, judge of said court, and same is in words and figures as follows, to-wit:

"STATE OF KENTUCKY:

Carlisle Circuit Court.

J. U. McKENDREE, Plaintiff,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY, Defendant. } Certificate.

"I, R. J. Bugg, sole presiding judge of the circuit court of Carlisle county in the State of Kentucky now and at the time of the trial of the above entitled cause, do hereby certify:—

That upon the trial of said cause the defendant, Illinois Central Railroad Company relied for its defense upon certain rights, privileges and immunities specially claimed by it under the Constitution of the United States of America, and it insisted upon its said rights, privileges and immunities throughout the trial of said action and in the assertion of them it claimed and contended that the various regulations and orders made and promulgated by the Secretary of Agriculture and offered in evidence on behalf of the plaintiff herein over the objections of defendant were unconstitutional, null and void as being in excess of the powers conferred or which could be conferred by act of Congress upon the Secretary of Agriculture under the Constitution of the United States of America, and that the said act of Congress approved February 2, 1902, under which the
20 Secretary of Agriculture assumed to promulgate said orders and regulations was itself unconstitutional null and void as being in conflict with the Constitution of the United States of America and in excess of the powers conferred by it upon the Congress.

Said defendant, Illinois Central Railroad Company, further contended throughout the trial of said cause that no right of action against it accrued to the plaintiff by reason of any of the alleged regulations or orders made or promulgated by the Secretary of Agriculture, and offered in evidence upon the trial of this action, or by reason of the alleged failure on the part of the defendant to observe or to comply with any of said regulations or orders on the ground that the said regulations or orders did not assume or attempt to give, and that the said act of Congress did not assume or attempt to give, to the plaintiff herein or to any other in like situation a remedy by way of civil action against the defendant herein for its alleged breach of any of said regulations or orders made or promulgated by the Secretary of Agriculture, and throughout the trial of said action the defendant, Illinois Central Railroad Company, specially set up and claimed even if said act of Congress and said regulations and orders were valid under the Constitution and laws of the United States, still it had a right, privilege or immunity under the said act of Congress or the said regulations or orders from any liability to the plaintiff, J. U. McKendree, in a civil action for damages claimed on account of its alleged breach of said regulations or orders.

In allowing the said regulations or orders of the Secretary of Ag-

riculture to be given in evidence before the jury and in overruling the motion of defendant to peremptorily instruct the jury to return a verdict in its favor, the Carlisle circuit court disallowed the
21 various contentions made as above stated on behalf of the Illinois Central Railroad Company, and denied the claims made by it of the rights, privileges, or immunities specially claimed by it as above stated, and held that the various claims made by it were not well founded in law under the Constitution and laws of the United States of America, and the claims of the plaintiff herein *was* established and a judgment in his favor, rendered solely by reason of defendant's alleged breach of said regulations and orders.

I do further certify that under the laws of the State of Kentucky the Carlisle circuit court is the highest court of said State in which said cause can be reviewed or tried or decision therein had and that there *is* no court of the State of Kentucky having jurisdiction under its laws to review or to reverse its judgment in this cause.

Given under my hand as sole presiding judge of the Carlisle circuit court during the entire time of the pendency of the above entitled cause in said court this 21st day of December, 1904."

"R. J. BUGG,"
"Sole Presiding Judge of the Carlisle Circuit
Court for Carlisle County, Kentucky."

(Endorsed:) "Filed, Dec. 23rd 1904. B. T. Huey, clerk."

22 Be it further remembered that on the 23rd day of December, 1904, there was filed in the circuit court clerk's office of Carlisle county, Kentucky, a petition for writ of error, assignment of writ of error and bond with supersedeas, which were duly signed by Hon. R. J. Bugg, judge of the Carlisle circuit court, and said instruments are in words and figures as follows, to-wit:

"The Supreme Court of the United States.

ILLINOIS CENTRAL RAILROAD COMPANY, Plaintiff in Error,
vs.
J. U. MCKENDREE, Defendant in Error.

The above named Illinois Central Railroad Company conceiving itself aggrieved by the orders made and the decision rendered and the judgment entered in the Carlisle circuit court for Carlisle county, Kentucky in the action of the above named defendant in error against the above named plaintiff in error in said court at its October term, 1904, to-wit: On the — day of October, A. D. 1904 said court being the highest court of the State of Kentucky having jurisdiction of said cause in which it might be tried or reviewed or in which a dicision of said cause might be had the said cause not being subject to review under the laws of

Kentucky in any higher court of said State, in which cause it was adjudged that defendant in error, J. U. McKendree, recover
23 of plaintiff in error, Illinois Central Railroad Company, the sum of sixty five dollars ($65.00) with interest from the — day of October, 1904 until paid at the rate of six per cent. per annum—presents herewith its assignment of errors and prays for a writ of error to issue out of said Supreme Court of the United States to the said circuit court of Carlisle county, Kentucky and the judge thereof to the end that the record in said matter may be removed to the Supreme Court of the United States and the errors complained of by your petitioner may be examined and corrected and said judgment of the Carlisle circuit court for Carlisle county, Kentucky be reviewed and reversed."

"ILLINOIS CENTRAL RAILROAD COMPANY,
By J. E. ROBBINS,
GUS THOMAS &
JOHN C. DOOLAN, Attorneys."

"Allowed by
R. J. BUGG,
Sole Presiding Judge Carlisle Circuit Court."

"J. E. BRIDGWATER,"
"J. M. DICKINSON,"
"ROBBINS & THOMAS,"
"TRABUE, DOOLAN & CO.,
Of Counsel."

24 Said assignment of errors filed herein is in words and figures as follows, to-wit:

"Supreme Court of the United States.

ILLINOIS CENTRAL RAILROAD COMPANY, Plaintiff in Error, *vs.* J. U. MCKENDREE, Defendant in Error. } Assignment of Errors.

"On this 21st. day of December in the year of our Lord 1904 comes plaintiff in error, Illinois Central Railroad Company by J. E. Robbins, Gus Thomas and John C. Doolan its attorneys, and says that in the record and proceeding had in the above entitled matter which was an action brought in the Carlisle circuit court for Carlisle county, Kentucky by the defendant in error, J. U. McKendree, against the plaintiff in error, Illinois Central Railroad Company, there is manifest error in the orders, decision and judgment of the said Carlisle circuit court in the following respects, to-wit:

I.

Said Carlisle circuit court for Carlisle county, Kentucky erred to the prejudice of the plaintiff in error, Illinois Central Railroad Company, in allowing the defendant in error, J. U. McKendree, over the objections of the plaintiff in error to offer and give in
25 evidence before the jury upon the trial of the above mentioned cause in the said Carlisle circuit court the said orders and regulations made and promulgated by the Secretary of Agriculture of the United States of America and amendments thereto made and promulgated by the said Secretary of Agriculture and by the acting Secretary of Agriculture of the United States of America which orders and regulations were and are designated as B. A. I. order No. 107 made and promulgated by the Secretary of Agriculture on March 13, 1903, and *and* the amendments thereto numbered respectively 1 to 15, both inclusive, made and promulgated respectively on March 14, 1903, May 5, 1903, September 1, 1903, September 24, 1903, and October 20, 1903 by the said Secretary of Agriculture and the said acting Secretary of Agriculture—in or by which said orders or regulations above mentioned it was attempted to be provided that a Federal quarantine line should be established across the United States of America running in an irregular manner from the Pacific ocean to the Atlantic ocean and extending through the State of Tennessee in a generally eastwardly and westerly direction in such a manner as to divide said State of Tennessee into two par*st*, and in and by which said orders and regulations and *and* amendments thereto it was attempted to be provided that the transportation of cattle from the area south of or below said Federal quarantine line above mentioned to any portion of the United States above, north, east or west of said Federal quarantine line should be prohibited and forbidden except upon certain conditions and subjected to certain restrictions and regulations therein prescribed.

Said Carlisle circuit court further erred in said matter in permitting defendant in error upon the trial of said cause to give in evidence over the objections of plaintiff in error, each and
26 every one of the regulations or orders or amendments thereto made and promulgated as above set forth.

To such ruling of the Carlisle circuit court in permitting each and all of said orders and regulations and amendments thereto to be given in evidence at the trial of said action the plaintiff in error throughtout the trial objected and excepted and it still objects and excepts thereto.

II.

Said Carlisle circuit court further erred in said matter in sustaining the demurrer of the defendant in error, J. U. McKendree, to so much of the answers as amended of the plaintiff in error, Illinois Central Railroad Company, as specially set and claimed rights, privileges and immunities under the Constitution and under the

laws of the United States of America, to which ruling of the said court plaintiff in error objected and excpeted throughout the trial and still objects and excepts.

III.

Said Carlisle circuit court further erred in said matter in holding and deciding against the protest and objections of the plaintiff in error, Illinois Central Railroad Company, that the said Secretary of Agriculture was empowered and that the said acting Secretary of Agriculture was empowered under the act of Congress approved February 2, 1903, entitled "An act," to enable the Secretary of Agriculture to more effectually sup-ress and prevent the spread of contagious diseases of live stock, and for other purposes," (which act is published and contained in volume 32 United States Statutes at Large beginning at page 791) to adopt or promulgate or en-
27 force any or all of the regulations or orders aforesaid or amendments thereto and in so holding and deciding the said Carlisle circuit court for Carlisle county, Kentucky erred in denying the contentions made through out the trial of said action on behalf of plaintiff in error to the effect that under the Constitution of the United States of America it had a privilege and immunity and exemption from any liability or proceeding of any character based upon the orders and regulations aforesaid.

IV.

Said Carlisle circuit court further erred in said matter in holding and deciding against the protest and objections of the plaintiff in error, Illinois Central Railroad Company, that the Congress of the United States of America is or was empowered by the Constitution of the United States of America to confer upon the Secretary of Agriculture authority to adopt or to promulgate or to enforce the said orders, rules or regulations, or any of them, or any amendments thereto, and in so holding and deciding the Carlisle circuit cou-t erred to the prejudice of the plaintiff in error, Illinois Central Railroad Company in denying the claims specially set up by it throughout the trial of said action to a privilege, immunity and exemption specially claimed by it under the Constitution of the United States from any liability or proceeding under any of the orders, rules and regulations aforesaid.

V.

28 Said Carlisle circuit court further erred in s-id matter to the prejudice of the plaintiff, in error in holding and deciding that any cause of action whatever occu-ed to the defendant in error, J. U. McKendree by reason of any alleged violation or breach of any of the orders, rules and regulations aforesaid or amendments thereto even if same could be regarded or treated as valid. In so doing the Carlisle circuit court denied the contentions made on be-

half of the plaintiff in error, Illinois Central Railroad Company, throughout the trial of said cause, and denied its claim of exemption from any proceeding under the Constitution or laws of the United States of America by reason of the facts alleged or sought to be proven by the defendant in error, J. U. McKendree, upon the trial of said action, which said rights, privileges and exemptions were specially set up and specially claimed by the plaintiff in error throughout the trial of said action in the Carlisle circuit court.

VI.

Said Carlisle circuit court further erred in said matter to the prejudice of the plaintiff in error, Illinois Central Railroad Company, in rendering a judgment in favor of the defendant in error, J. U. McKendree, against the said plaintiff in error for the sum of sixty five dollars ($65.00) and interest or for any sum based upon the claim of a failure on the part of plaintiff in error to observe or to comply with the rules, regulations and orders on amendments thereto promulgated as aforesaid by the Secretary of Agriculture and by the Acting Secretary of Agriculture."

"ILLINOIS CENTRAL RAILROAD COMPANY,
By J. E. ROBBINS,
GUS THOMAS, AND
JOHN C. DOOLAN,
Attorneys."

"J. E. BRIDGWATER,"
"J. M. DICKINSON,"
"ROBBINS & THOMAS,"
"TRABUE, DOOLAN & COX,"
Of Counsel."

29 STATE OF KENTUCKY:

Carlisle Circuit Court.

Desiring to give the petitioner, Illinois Central Railroad Company an opportunity to test in the Supreme Court of the United States the questions presented in its petition for writ of error and in its assignment of errors by which said petition is accompanied, it is ordered that a writ of error from the Supreme Court of the United States to the Carlisle circuit court for Carlisle county, Kentucky be and the same is hereby allowed, and it is ordered that the same be made a supersedeas and a bond in the penal sum of five hundred dollars ($500.00) herewith presented is approved.

In testimony whereof I hereunto set my hand this the 21st day of December, 1904."

"R. J. BUGG,
Sole Presiding Judge of the Carlisle Circuit Court for Carlisle County, Kentucky."

30 Said bond executed by the Illinois Central Railroad Company is in words and figures as follows, to-wit:

"Carlisle Circuit Court.

J. U. McKENDREE, Plaintiff,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY, Defendant.

Know all men by these presents that the Illinois Central Railroa Company, principal, and J. E. Robbin, Gus Thomas and John Doolan sureties are held and firmly bound unto the above name J. U. McKendree in the sum of five hundred dollars ($500.00) to b paid to the obligee, herein, to which payment well and truly to b made we bind ourselves and each of us, jointly and sever-ly, and ou and each of our successors, heirs, executors, and administrator firmly by these presents.

Sealed with our seals and dated the 21st. day of December, 190

Whereas, the above named Illinois Central Railroad Compan has prosecuted a writ of error from the Supreme Court of the Unite States to reverse the judgment rendered in the above cause by th Carlisle circuit court for Carlisle county, Kentucky:

Now, therefore, the condition of this obligation is such that if th above named Illinois Central Railroad Company shall prosecute i said writ of error to effect and, if it shall fail to make good its ple *and* answer the whole amount of the judgment herein, including th just damage for delay and all cost and interest, then this obligatio shall be void; otherwise the same shall be and remain in full for and effect."

31 "ILLINOIS CENTRAL RAILROAD COMPANY,
By J. E. ROBBINS,
GUS THOMAS, AND
JOHN C. DOOLAN, Attorneys." [L. S.]
"J. E. ROBBINS." [L. S.]
"GUS THOMAS." [L. S.]
"JOHN C. DOOLAN." [L. S.]

"Sealed and delivered in the presence of and approved by m this 21st. day of December, 1904."

"R. J. BUGG,
Sole Presiding Judge of the Carlisle Circuit
Court for Carlisle County, Kentucky."

(Endorsed:) "Filed, Dec. 23" 1904. B. T. Huey, cl'k."

32 Writ of Error.

UNITED STATES OF AMERICA:

The President of the United States to the Carlisle circuit court of Kentucky and to the judge thereof, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Carlisle circuit court, before the judge thereof, being the highest court of law or equity of the said State in which a decision could be had in the said suit between J. N. McKendree plaintiff and The Illinois Central Railroad Company, defendant, wherein was drawn in question the validity of a statute of the United States and the decision as against its validity, or wherein was drawn in question the validity of a statute or constitution of or an authority exercised under said State of Kentucky, on the ground of their being repugnant to the Constitution or laws of the United States, and the decision was in favor of such their validity, or wherein was brought in question the construction of a clause of the Constitution or of a statute of the United States and the decision was against the right, title, privilege, or exemption specially set up or claimed under such clause of the said Constitution or statute, a manifest error hath happened, to the great damage of the said Illinois Central Railroad Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States together with this writ, so that you have the same at Washington
33 within thirty days from the date hereof, in said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 21st day of December, in the year of our Lord, one thousand nine hundred and four, and of the Independence of the United States of America the one hundred and twenty-ninth.

[Seal 6th Circuit Court Wes. Dist. Ky., U. S. of America.]

THOS. SPEED,
Clerk of the Circuit Court of the United States
for the Western District of Kentucky,
By HENRY F. CASSIN, D. C.

Allowed by
R. J. BUGG,
Judge Carlisle Circuit Court.

Filed Dec. 23" 1904. B. T. HUEY, Cl'k.
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34 "UNITED STATES OF AMERICA:

The President of the United States to J. U. McKendree, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington within thirty days from the date thereof, pursuant to a writ of error filed in the clerk's office of the Carlisle circuit court, wherein Illinois Central Railroad Company is plaintiff in error and J. U. McKendree is defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable R. J. Bugg, judge of the Carlisle circuit court, of Kentucky, this the 21st day of December, in the year of our Lord, one thousand nine hundred and four."

"R. J. BUGG,
Judge of the Carlisle Circuit Court of Kentucky."

Be it further remembered that the said citation herein was placed in the hands of the sheriff of Carlisle county to do execution thereon, and the same was returned to my office with the following endorsement thereon, to-wit:

"Executed in full, by delivering a copy of the within citation to J. U. McKendree, this Dec. 24th, 1904."

"JAY WILLINGHAM, S. C. C.,
By R. W. ROWLAND, D. S."

35 Be it remembered that on the 4th day of November, 1904, the following bill of exceptions No. 1, was filed herein and the same is in words and figures as follows, to-wit:

Carlisle Circuit Court.

J. U. MCKENDREE, Plaintiff,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY, Defendant.

Bill of exceptions No. 1, taken at the trial of the above-styled case, in the Carlisle circuit court, on the 24th day of October, 1904, wherein the Hons. Wickliffe, Wiley & Nichols appeared as attorneys for the plaintiff and the Hons. Bridgwater, Robbins and Thomas appeared for the defendant, before his honor R. J. Bugg, judge of the Carlisle circuit court, and a jury.

36 Be it remembered that upon the trial of this case the plaintiff, J. U. McKendree was introduced as a witness in his own behalf and having been duly sworn testified as follows:

Examined by Hon. J. M. NICHOLS:

1. Tell the jury where you reside?
A. Arlington.

2. I will ask you to tell the jury if you owned some milk cows prior to August 13th?

A. Owned two.

3. Tell the jury where them cows ranged?

A. Out on the commons in town, back and forth, towards town going north there is ten acres of land that belongs to the railroad and they use that and on out to the watering places further north.

4. Now tell the jury how the Illinois Central stock pens are situated as to the public road at that point?

Objections by attorney for defendant.

Overruled by the court.

Exceptions taken by defendant's attorney.

A. It lay between the big road and the railroad right along by the side of the big road.

5. How close was this stock pen to the public highway?

A. They were in three or four feet of the public highway.

6. Well, did them cattle pass that stock pen?

Objections by defendant's attorney.

By the COURT: That's rather leading. I will sustain an objection to the quaes-ion as asked.

37 7. I will ask you if your cattle in going to their range what direction and what range did they go?

A. They would go right north, the bid road, going to the range, and every day pass the road by the stock pens, couldn't held it, and through the stock pens.

8. I will ask you if at any time the stock pens were left open after the cattle were taken out?

A. Yes sir, the stock pens stood open when the cattle was taken out they just left it open and they would go there.

9. I will ask you to tell the jury whether or not there was any palnk fence, walls of any kind, up around that stock pen, during the time these cattle were in there and immediately following?

A. Nothing only a common fence to hold them in there.

10. Describe it?

A. It was just a common plank fence seven or eight planks high.

11. Was that fence built with the planks running long wise or up and down?

A. Length wise.

12. Any closed walls?

A. No, just open.

13. Well, I will ask you if your cattle contracted any disease and idf so what that disease was pronounced to be?

Objections by defendant's attorney.

By the COURT: You needn't state what it was pronounced to be.

38 A. They contracted a disease, yes, sir, and died.

14. How were thay affected?

A. Well, they would stand with their heads stuck down until they just died.

15. What did they have in them?

A. Ticks.

16. State whether these cattle were examined by a veterinary?

A. Yes, sir.

17. I will ask you whether or not your premises were quarantined by any authority and if so what?

Obeections by defendant's attorney.

Overruled by the court.

Exceptions taken by defendant's attorney.

A. Yes, sir, quarantined by some authority, State or Government, quarantined for three or four months.

18. Why was that done?

Objections by defendant's attorney.

Sustained by the court.

Exceptions taken by the plaintiff.

19. What was your cattle reasonable worth?

A. There was one of them was worth $50.00 and the other was worth $30.00 or $35.00.

20. Was the- a post mortem examination held over these cattle of yours?

A. You mean——

By the COURT: After death.

39 A. Not mine, they did one.

By the COURT: Well, we are just investigating yours now.

21. *They* were post mortem examinations over cattle that died at the same time yours did?

A. Yes, sir, the same day and at the same place.

22. Did you see the Jones cattle?

A. Yes, sir, in the stock pens.

23. How long were they there before your cattle contracted the disease?

A. I can't tell just the date, they was there some ten or fifteen days before I noticed mine being sick.

24. I will ask you to state whether or not there was a number of cattle that contracted a similar disease as yours and died right along aboue the same time?

Objections by defendant's attorney.

By the COURT: He had better not answer that.

Exceptions by plaintiff.

Cross-examined.

By Hon. GUS THOMAS:

1. You say this was about fifteen days after the Jones cattle was taken out of the pen that your cattle contracted this disease?

A. I am not sure as to the time, something like that.

40 2. How long did the Jones cattle stay in the pens?

A. Oh I don't know, perhaps unloaded on one day and staid there until the next day or the next day after that?

3. They were in this pen that you have described here before in your testimony?

A. Yes, stock pen.

4. About how high is the fence around that pen?

A. Five or six feet high?

5. How large is the pen?

A. I expect it was as large as this house.

6. What became of these cattle?

A. I don't know.

7. You say that the Jones cattle which were the cattle shipped by the company were taken out of the pen and the pen was left open?

A. Yes.

8. Did your cows go into that pen after that?

A. They could have done it.

9. Do you say that they did do it?

A. I say they got that fever there and got them ticks on them from some cause.

10. I asked you did they go into the pen?

A. I don't know.

11. How old were your cows?

A. One of them was six years old and the other was seven.

12. What kind of stock were they?

A. One was a Jersey cow and the other was a Durham.

41 13. How long were they sick?

A. Why, from the time I found the ticks on them *one them* one of them was only sick about two days and the other one was sick six or seven days.

14. Did you continue to let them run out much, run out at large after they were sick?

A. No, the Joursey cow when I found her she couldn't run.

15. I dont' mean get out and run?

A. I understand.

16. Did she run at large?

A. After I found her she died in a few hours afterwards.

17. Up to that time she had been running at large hadn't she?

A. Yes sir.

18. And the other one had too?

A. Yes sir.

42 Be it further remembered that upon the trial of this case plaintiff introduced as a witness in his behalf and had sworn E. D. HOUSE who testified as follows:

Examined by Hon. J. N. NICHOLS:

1. I will ask you to tell the jury where you live?
A. Arlington, Ky.
2. What position do you hold at Arlington?
A. I am the agent for the I. C.
3. What position did you hold the last July?
A. The same thing.
4. Have you got a record of the I. C. Railroad Company that shows a list of the cattle received?

Objections by attorney for the defendant.

By Mr. THOMAS: We admit the shipping of the cattle from Grand Junction to Arlington, it is admitted in the pleadings.
By the COURT: It stands admitted, don't persue it further.

5. I will ask you at the time these cattle were received by you if you had an order in your office something like this?

Objections by defendant's attorney.
Sustained by the court.
Exceptions taken by the pl'e'ff.

6. How long did the Jones cattle remain in the pens at Arlington?
A. They came in on Saturday night, I don't know just what time, I suppose along about mitnight, I usually left the office at
43 eight o'clock and they wasn't in the pens when I come on duty at seven o'clock Sunday morning.
8. Did you see them at all?
A. No, sir, I didn't.

Cross-examined.

By Hon. GUS THOMAS:

1. If I understand you then they came into the pens between eight o'clock, the time you left, and had been removed by seven o'clock the next morning when you came in?
A. Yes, sir.

44 Be it further remembered that upon the trial of this case the plaintiff introduced as a witness in his behalf and had sworn R. H. Brown who testified as follows:

Examined by Hon. J. M. NICHOLS:

1. Tell the jury where you live?
A. About three miles north of Arlington.
2. I will ask you to tell the jury if you know anything about the

Jones cattle that were shipped from the South last summer, J. A. Jones?

A. I pastured them eight days on my place.

3. Where were they brought from when they were put on your place?

A. Brought from town.

4. From Arlington?

A. Yes, so Mr. Jones says.

Objections by defendant's attorney.

Overruled by court.

Exceptions taken by defendant.

5. What was the condition of the cattle at the time they came to your farm?

A. Well sir, I wasn't closer that two or three hundred yards to the cattle the day he brought them out, and only saw them once while they were there, possibly two or three days after he brought them, they were a scalawag looking lot of cattle to me, southern cattle.

6. What was the result of them cattle being on your place, what resulted from the cattle?

45 Objections by defendant.

Overruled by the court.

Exceptions by the defendant.

A. How am I to determine whether anything developed from the cattle or not, I can state that I lost a lot of cattle beginning some six weeks after they were put in my pasture.

By Mr. THOMAS: I object and move to exclude that.

Overruled by the court.

Exceptions by defendant.

By the COURT: Go on and state.

A. On the 13th day of July, Jones brought 39 head of cattle to my pasture and left them there eight days, and the first one I lost I think was the 27th of August, forty or forty five days after he brought them out, and then I lost them right along for several weeks until I lost sixteen head, and lost one this spring, one that never entirely rallied I didn't think from the disease.

Objections by defendant's attorney.

By COURT: What was the matter with your cattle?

A. I am not a veter-narian.

By the COURT: Tell how they were affected?

A. They were covered with ticks and become feeverish and would stand about in branches.

Exceptions by defend-nt's attorney.

A. And their heads dropped and their ears dropped down and they lingered along that way for a few days and some times for sev-

eral weeks. I didn't lose all I had, six calves and six older ones pulled through.

46 8. I will ask you if you noticed any ticks on these cattle?
A. Which cattle, mine?

9. Yes.

A. Yes, sir.

10. Did you notice the Jones cattle?

A. No, sir, I never was near any of the Jones cattle but once and didn't pay special attention to them.

11. Where did you- cattle get the ticks?

A. I don't know, I never permit any of my cattle on the outside and they were never off of my place, and I just supposed, you know, that they got them from the Jones cattle.

Objections by defendant's attorney.
By COURT: Yes, you needn't state that.

13. I will ask you if your farm was visited by the State of Federal veterinary and if so was there any quarantine established there?

A. Objections by defendant's attorney.
Overruled by court.
Exceptions by defendant.

A. Yes, sir, the State board of health quarantined my place on account of the Texas fever.

Objections by defendant's attorney.
Overruled by court.
By Mr. THOMAS: We move to exclude that.
Overruled by court.
47 Exceptions by defendant.

14. Was there a post mortem examination held over your cattle?

By the COURT: Never mind.

Cross-examined.

By Hon. GUS THOMAS:

1. Did any of the Jones cattle die while on your place?
A. No, sir.

By the COURT: It is admitted that Grand Junction, Tenn. from whence the cattle was shipped is south of the quarantine line established by the United States Government.

By the COURT: The plaintiff now offers B. A. I. orders number 107, and amendments one to fifteen to said order, to which the defendant objects, objections overruled and said order is permitted to be introduced as evidence and read, to which defendant excepts, said order being in words and figures as follows, to-wit:

48 DEPARTMENT OF AGRICULTURE,
OFFICE OF SECRETARY,
WASHINGTON, D. C.

I, James Wilson, Secretary of the Department of Agriculture of the United States of America, do hereby certify that the following and annexed are true and correct copies of B. A. I. order No. 107 and of amendments No. 1 to 15 to said order No. 107, the origonals being in the department's files.

In witness whereof I have set my hand and affixed the seal of the department.

Done at Washington, this six- day of May, one thousand nine hundred and four.

[SEAL.] JAMES WILSON, Secretary.

49 (B. A. I. Order No. 107.)

Regulations to Prevent the Spread of Splenetic Fever Among Cattle.

U. S. DEPARTMENT OF AGRICULTURE,
OFFICE OF THE SECRETARY,
WASHINGTON, D. C., March 13, 1903.

To managers and agents of railroads and transportation companies of the United States, stockmen, and others:

In furtherence of the regulations for the suppressing and extirpating of contagious and infectious diseases among domestic animals in the United States, dated March 10, 1903 (B. A. I. order No. 106), notice is hereby given that a contagious and infectious disease known as splenetic, southern, or Texas, fever exists among cattle in the district described below:

1. All that country lying south or below, a line beginning at the north west corner of the State of California; thence east, south and southeasterly along the boundary line of said State of California to the southeastern corner of said State; thence southerly along the western boundary line of Arizona to the south west corner of Arizona; thence along the southern boundary lines of Arizona and New Mexico to the south eastern corner of New Mexico; thence northerly along the eastern boundary of New Mexico to the southern line of the State of Colorado; thence along the southern boundary lines of Colorado and Kansas t- the south eastern corner of Kansas; thence southerly along the western boundary line of Missouri to the southwestern corner of Missouri; thence easterly along the southern boundary line of Missouri to the southwestern corner of Missouri to the western boundary line of Dunklin county; thence easterly along the southern boundary line of Missouri to the Mississippi river; thence northerly along the Mississippi river to the northern boundary line of Tennessee at the north west corner of Lake county;

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thence easterly along said boundary line to the north east corner of Henry county; thence in a northerly direction along the boundary of Tennessee to the north west corner of Steward county; thence in an eastern direction along the *norenth* boundary of Tennessee to the north western corner of Virginia; thence northeasterly along the western boundary line of Virginia to the northern most point of Virginia; thence southerly along the eastern boundary line of Virginia, where it joins the south eastern corner of Maryland at the Atlantic ocean.

51 2. When ever any State or Territory located above or below said quarantine line, as above designated, shall duly establish a dif-erent quarantine line, and obtain the necessary legislation to enforce said last mentioned line strictly and completely within the boundaries of said State or Territory, and said last above mentioned line and the measures taken to inforce it are satisfactory to the Secretary of Agriculture, he may, by a special order, tempo-rar-ly adopt said State or Territory line.

Said adoption will apply only to that portion of said line specified, and may cease at any time the Secretary may deem it best for the interest involved, and in no instance shall said modification exist longer than the period specified in said special order; and at the expiration of such time, said quarantine line shall revert without further order to the line first above described.

52 Whenever any State or Territory shall establish a quarantine line, for above purposes, dif-erently located from the above described line, and shall obtain by legislation the necessary laws to enforce the same completely and strictly, and shall desire a morification of the Federal quarantine line to agree with such State or Territory line, the proper anthorities of such State or Territory shall forward to tbe Secretary of Agriculture a true m*at* or description of such line and a copy of the laws for enforcement of same, duly authenticated and certified.

3. Cattle are to – transported from said area so-th, or below said Federal quarantine line above described to any portion of the United States above north, east, or west of the above described line, except as hereinafter provided.

4. Cattle from area may be transported by rail or boat for immediate slaughter and when so transported the following regulations must be observed:

(*a.*) When any cattle in course of transportation from said area are unloaded above, north, east or west of this line to be fed or watered, or for other purposes, said cattle shall be placed in pens or yards set apart for infected cattle, and no other cattle shall be admitted thereto.

(*b.*) On unloading said cattle at their point of destination chutes, *always*, and pens, sufficiently isolated, shall be set apart to receive them, and no other cattle shall be admitted to said chutes, pens, and alleyways: and the regulations relating to the movement of cattle from said area, prescribed by the cattle sanitary officers of the State

where unloaded shall be carefully observed. The cars or boats that have carried said stock shall be cleansed and disinfected as soon as possible after unloading and before they are again used to transport, store, or shelter animals or merchandise.

53 (c.) Where southern cattle and cattle origonating out side of the quarantine districts are yarded in adjacent pens, there shall — left a space between them not less than ten feet wide, and there shall be on each side of this space, which shall not be used for cattle, a tight board fence not less than five feet high.

(d.) All cars carrying cattle from said area shall bear on both sides printed placards, the letter of which shall be plain and not less than 1 & ½ inches in hight, to be affixed by the railroad company hauling the same, stating that said cars contains southern cattle; and each of the way bills, conductors' manifests and bills of lading of said shipments by cars or boats shall have a note plainly written or stamped upon its face with a similar statement. The placards shall state the name of the place from which the shippment was made, with the date, and the name of the place of destination: said date must correspond with the waybill and other papers. Whenever any cattle have come from said area and shall be reshipped from any point at which they have been unloaded to other points of destination, the cars carrying said animals shall bear on both saide similar placards with like statements, and the waybills, conductors' manifests, or bills of lading be so stamped. At whatever point these cattle are unloaded they must be placed in separate pens to which no other cattle shall be admitted.

(e.) No boat having on board cattle from said district shall receive on board cattle from outside of said district. Cattle from said district shall not be received on board when destined to points outside of said district where proper facilities have not been provided for transferring the said cattle from the landing to the stock yar-s and slaughter houses without passing over public highways, unless per-

54 mission for such passing is first obtained from the local authorities.

(f.) The cars and boats used to transport such animals the chutes, alleyways, and pens used during the transportation and at points of destination shall be disinfected in the following manner:

Remove all litter and manire. This litter and manure may be disinfected by mising it with lime saturating it with *it* a 5 per cent. solution of 100 per cent. carbolic acid; or, if not disinfected, it may be stored where no cattle can come in contact with it from February 1, to November 15, of each year.

Wash the cars and feeding and watering troughts with water until clean.

Saturate the entire interior surface of the cars and the fencing, troughs chutes and floors of the pens with a mixture made of 1½ pounds of lime and ¼ pound of 100 per cent. straw color-d carbolic acid to each gallons of water or a solution made by dissolving four ounces of chloride of lime to each gallon of water may be used;

or disinfect the cars with a *jet* of steam under a pres-ure of not less than fifty pounds to the square inch.

(*g*.) Cars which have carried cattle within the quarantine districts shall be cleaned and disenfected before teken out of said district, except when loaded with cattle in course of transportation in accor-ance with these regulations.

5. Cattle from the Republic of Mexico may be admitted into the United States after inspection in accordance with law, as follows: cattle free from splenetic, or Texas, fever and from contact therewith during the six months preceeding such inspection, and which have graved in a locality free from infection of such fever, may be
55 admitted into any part of the United States.

If destined to points in the non-infected area, a special permit must be obtained from an inspector of the Bureau of Animal Industry, said permit being issued according to the regulations of said bureau. The cattle for which said permit is issued must not be driven through the infected area nor be unloaded in any part thereof except at such a point as may be duly designated by an order issued by this department.

If shipped in infected cars or unloaded in disinfected area except as above stated, they will be subject to the regulations concerning infectious cattle.

6. Notice is hereby given that cattle infected with the Boophilus annulatus (B. bovis), or southern cattle tick disseminate the contagion of splenetic, southern, or Texas, fever; therefore cattle origonating outside of the district described by this order or amendments thereof, and which are infested with the Boothilus annulatus ticks, shall be considered as infectio-s cattle and shall be subject to the rules and regulations governing the movement of southern cattle.

7. Stock yard companies receive- cattle infected with such ticks shall place such cattle in the pens set apart — aside for the use of southern cattle; and transportation companies are required to clean and disinfect all cars and boats which have contained same, according to the requirements of this department.

8. Inspectors are instructed to see that disinfection is properly done, and to report instances of improper -infection and other violations of this order.

9. Violations of these regulations is punishable by a fine of not less than one hundred dollars nor more than one thousand
56 dollars or by imprisonment not more than one year, or by both such fine and imprisonment.

10. These regulations supersede B. A. *L.* order No. 101, and amendments thereto.

(Signed) JAMES WILSON, Secretary.

57 Amendment No. 1 to B. A. I. Order No. 107.

Special Order Modifying Quarantine Line for the State of California.

(1903.)

U. S. DEPARTMENT OF AGRICULTURE,
OFFICE OF THE SECRETARY,
WASHINGTON, D. C., March 14, 1903.

In accordance with the regulations to grevent the spread of splenetic fever of cattle, the State of California, has agreed to establish and coöperate in the inforcement of a quarantine line located as follows:

Beginning on the Pacific coast where the northern boundary line of Monterey county connects with the Pacific ocean; thence easterly and southerly along the northern and eastern boundary lines of Monterey county to its junction with the western boundary of Fresno county; thence northerly along the western boundary of Fresno county to the western corner thereof; thence northerly, easterly, and southerly along the western, northern, and eastern boundary line of Merced county to the south east corner thereof; thence north easterly along the northern boundary of Madera county to the north east corner thereof; thence southerly and easterly along the easetrn boundary line of Madera Fresno, and Tulare counties to the south east corner of Tulare; thence easterly along the southern boundary line of Inyo county to its intersection with the eastern boundary line of the State of California; and whereas said quarantine line as above set forth is satisfactory to this department, and legisla-
58 tion has been enacted by the State of California to enforce said quarantine line, therefore the above quarantine line is adopted for the State of California by this department for the period beginning with the date of this order and ending December 31, 1903, in lieu of the quarantine line described in the order of March, 13, 1903, for said area, unless otherwise ordered.

It is further ordered, that, during the continuance of the above line no cattle origonating in the quarantined area described in B. A. *L.* order No. 107, as modified, shall be moved or allowed to move into the counties of Kern, Tulare, Kings, Monterey, Fresno, Madera, and Merced; and that cattle now in said counties may be moved to points out side of the quarantine area for purposes other than immediate slaughter upon the inspection and certification that they are f-ee of infection by a duly authorised office- of the county board of supervisors, and that a said certificate be approved and signed by the State veterinarian. This privilege is granted upon condition that the board of supervisors in each of said counties adopt and encorce efficient measures to prevent the introducing into and the dissemination within the county of the contagion of south-

ern cattle fever, and that it prosecute measures for the eradication of said disease.

JAMES WILSON, Secretary.

(Amendment No. 2 to B. A. I. Order No. 107.)

Special Order Modifying Quarantine Lines for the State of California.

(1903.)

U. S. DEPARTMENT OF AGRICULTURE,
OFFICE OF SECRETARY,
WASHINGTON, D. C., March 14, 1903.

59 In accordance with the regulations to prevent the spread of splenetic fever of cattle, the State of Texas has agreed to establish and to coöperate in the enforcement of a quarantine line located as follows:

Beginning at the intersection of the southern boundary of New Mexico with international boundery line at the Rio Grande river thence south easterly along said international boundary line to the south west corner of the county of Pecos; thence following the western boundary of Pecos county to the south east corner of Reeves county; thence following the boundary line between the counties of Pecos and Reeves to the Pecos river; thence south easterly following the Pecos river to the north west corner of Crockett county; thence east along the northern boundary of Crockett and Schleicher counties to the south eastern corner of Irion county; thence north along the eastern boundary of Irion county to the north east corner of said county; thence continuing due north to the southern boundary line of Coke county; thence west with the southern boundary of Coke county to the south west corner of Coke county; thence north along the western boundary of Coke county to the southern boundary of Mitchell cou-ty; thence east to the south east corner of Mitchell county; thence north along the eastern boundary of Mitchell county to the north east corner of said county; thence east along the southern boundaries of Fisher and Jones counties to the south east corner of Jones county; thence north along the eastern boundary of Jones county to the north east corner of said county; thence east along the southern boundary of Haskell county to the south east corner of said county; thence north along the western bound-
60 ary lines of Throckmorton and Baylor counties to the north west corner of Baylor county; thence east along the southern boundary of Wilbarger county to the south east corner of said county; thence north along the eastern boundary of Wilbarger county to the Red river; thence continuing in a north westerly direction along the course of said river and the northern boundary of Texas to the south east corner of Greer county Oklahoma, Territory.

And whereas said quarantine line, as above set forth, is satisfactory to this department, and legislation has been enacted by the State of Texas to enforce said quarantine line, therefore the above quarantine line is adopted for the State of Texas by this department for the period beginning with the date of this order and ending December 31, 1903, in lieu of the quarantine line described in the order of March, 13, 1903, for said area, unless otherwise ordered.

It is further ordered, that, during the continuance of the above line, no cattle origonating in the quarantine area as described in B. A. L. order No. 107, as modified, shall be moved or allowed to move into the counties of Baylor and Throckmorton, and that portion of the county of Pecos lying north and west of the line described as follows:

Beginning at the west line of Pecos county, and the point where the road bed of the G. H. & S. A. railroad crossed said line: thence in a easterly direction with the center of said road bed to a point on section No. 36, block A. 2, G. H. & S. A. Railroad Company; thence north with the pasture fence running in a northerly direction through the eastern part of section Nos. 13 and 12 of said block A. 2, and across section No. 1, G. C. & S. F. Railroad Company; thence continuing north with said pasture fence through the eastern part of section- Nos. 16, 17 46, 47, 76, 77, 106, 107, 136, 137, 142,
61 143 and 193 block D. M. K. & T. E. Railroad Company; thence continuing in a northerly direction to a point on the north line of section No. 6, block 160, G. C. & S. F. Railroad Company, same being corner of pasture fence; thence east with the north line of section- Nos. 6, 9, 10, 11, 12, 15, 16 block 160, G. C. & S. F. Railroad Company to the north east corner of said section No. 16, same being corner of pasture fence; thence in a northerly direction with the east boundary lines of sections Nos. 22, 21, 20, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, block 1, C. C. S. D. & R. G. N. G. Railroad Company, to the north east corner of said section 32; thence west with the north boundary lines of section- Nos. 32 and 33, same block, to the north west corner of section No. 33, block I. C. C. S. D. & R. R. G. N. G. Railroad Company, corner of fence; thence north with the east boundary line of sections Nos. 1, 12, 13, 24, 25, 36, 37, 48, 49, 60, 61 and 72, block 2, C. C. S. D. & R. G. N. C. Railroad Company, to the north east corner of said section No. 72; thence in and easterly direction with the fence to the south east corner of section No. 9, paptented to James E. Evans; thence north with the east line of said section No. 9, to the north west corner of section No. 100, block A. 2, T. C. Railroad Company; thence east with the north boundary line of said sections Nos. 11, and 89, block 2 T. G. Railroad Company; thence north with the east boundary line of sections Nos. 90, 91, 92, and 93, to the south east corner of section 94, block A. 2, T. C. Railroad Company; thence north and west diagonally across section No. 94 to the north west corner of said section; thence continuing in a north westerly direction, diagonally across sections Nos. 14, 18, and 28 to the north east corner of section No. 29, bloc

C. 4, G. C. C. & S. F. Railroad Company; thence west with
62 the north boundary line of said section No. 29 to the north west corner of said section; thence north west diagonally across section No. 1, T. C. Railroad Company, section No. 97, block No. 194, G. C. & S. F. Railroad Company, to the north east corner of said section No. 96; thence in a northerly direction across section No. 94 to a point on *it* its north boundary line 600 varas west of its north east corner; thence continuing north through sections Nos. 93, 90, 89, 85, and 58, block 194, G. C. & S. F. Railroad Company, to a point on the north boundary line of said section No. 58; thence north westerly with the pasture fence through section No. 59, to the north eastern corner of section No. 82 and the south east corner of section 81, same block; thence continuing north westerly to section No. 17, H. & G. N. Railroad Company; thence north with the east line of said section 17 to the Pecos river; thence north westerly with said Pecos river to the north west corner of Crockett county.

It is further ordered that no cattle shall be moved or allowed to move from the counties of Cottle, Hardeman, Foard, Wilbarger, King, Knox, Stonewall, Jones, Fisher, Scurry, Garza, Borden, Howard, Mitchell, Glasscock, Sterling, Irion, West Tom Green, Upton, Crane, Throckmorton and Baylor, and that portion of the county of Pecos as described above, to any of that territory in the State of Texas lying west and north of said counties except after having been inspected and found free of infection by duly authorized inspectors of this department or of the State of Texas, and upon written permission by such officer. No cattle from said counties shall be moved or allowed to move to State or Territory outside of the quarantine district (except as provided for immediate slaughter)
63 unless they have been duly inspected and passed and permit issued by the inspectors of this department, not until permission has been obtained from the proper officials of the State or Territory to which said cattle are destined.

JAMES WILSON, Secretary.

(Amendment No. 3 to B. A. I. Order No. 107.)

Special Order Modifying the Quarantine Line for the Territory of Oklahoma.

(1903.)

U. S. DEPARTMENT OF AGRICULTURE,
OFFICE OF THE SECRETARY,
WASHINGTON, D. C., March 14, 1903.

In accordan-e with the regulations to prevent the spread of splenetic fever of cattle, the Territory of Oklahoma has agreed to establish and to coöperate in the enforcement of a quarantine line located as follows:

Beginning on the Red river at the south eastern corner of the county of Greer; thence northerly following the course of the north fork of Red river at its intersection with the southern boundary line of Roger Mills county; thence east along the southern boundary lines of Roger Mills county and Washita county to the south east corner of Washita county, thence north along the eastern boundary lines of Washita and Custer counties to the Canadian river; thence in *the* a southeasterly direction along the course of said river to the south east corner of Canadian county; thence north along the
64 eastern boundary line of Canadian county to the north west corner of Cleveland county; thence east along the northern line of Cleveland county to the middle of the right of way of the Atchison, Topeka and Santafee railway; thence northerly following the middle of said right of way through Oklahoma, Logan, Noble, and Paynes counties, and the Otoe, Missouri and Ponca Indian reservation to the northern boundary of the Ponca Indian reservation; thence east along the northern boundary of the Ponca Indian reservation to the Arkansas river; thence in a northerly direction following the course of said river to its intersection with the thirty seventh parallel of the northern latitude at the southern boundary of Kansas.

And where said quarantine line as above set forth, is satisfactory to this Department, and legislation has been enacted by the Territory of Oklahoma to enforce said quarantine, therefore the above quarantine line is adopted for the Territory of Oklahoma by this Department for the period beginning with the date of this order, and ending December 31, 1903, in lieu of the quarantine line described in the order of March 13, 1903, for said area, unless otherwise ordered.

It is further ordered that, during the continuance of the above line, no cattle shall be moved or allowed to be moved from the counties of Greer, Roger, Mills, Wishita, Custer, Blaine, (north of the Canadian river) Canadian, and that part of the counties of Oklahoma, Logan, Payne, and Noble, and of the Otoe, Missouri and Ponca Indain reservation lying west of the right of way of the Atchinson, Topeka & Santafee railway, to any of that part of the Territory of Oklahoma lying west and north of said line, excepts after having been inspected and found free of infection by duly
65 authorized instectors of this Department or of the Territory of Oklahoma, and upon written permission by such officer, nor to any State or Territory out side of the quarantine district, (except as provided for immediate slaughter, unless they have been duly inspected and passed, and permit issued by inspectors of this Department nor until permission has been obtained from the proper officials of the State or Territory to which destined.

JAMES WILSON, Secretary.

(Amendment No. 4 to B. A. I. Order No. 107.)

Special Order Modifying Quarantine Line for the State of Tennessee.

(1903.)

U. S. DEPARTMENT OF AGRICULTURE,
OFFICE OF THE SECRETARY,
WASHINGTON, D. C., March 14, 1903.

In accordance with the regulation to prevent the spread of splen-tic fever of cattle, the State of Tennessee has agreed to establish and to coöperate in the inforcement of a quarantine line located as follows:

Beginning on the Mississippi river at the south east corner of the State of Missouri at the western boundary of Tennessee; thence southerly along the western boundaries of the counties of Dyer and Lauderdale,; thence following the main channel of the Missi-ppi riaver (leaving Island No. 37 to the north and west) to the north west corner of Shelby county on the Mississippi river; thence 66 easterly along the northern boundary line of Shelby and Fayette counties to the south western corner of Haywood county; thence northerly and easterly along the western and northern boundary lines of Haywood county to the north eastern corner of said county; thence easterly along the northern boundary lines of Madison county to the south western corner of Carroll county; thence northerly and easterly along the western and northern boundary lines of Carroll county to the north east corner of said county; thence southerly along the eastern boundary of said county to its intersection with the N. C. & St. L. railway; thence easterly along the maddle of the road bed of said railroad through Benton county to the intersection of the N. C. & St. L. railway with the Tennessee river at the eastern boundary of Benton county; thence south along the eastern boundaries of Benton and Decatur counties to the north west corner of Wayne county; thence easterly along the northern boundary *of* lines of Wayne and Lawrence counties to the north eastern corner of Lawrence county; thence south along the eastern boundary of Lawrence cou-ty to the south east corner thereof; thence east along the southern boundary of Giles county to the Elk river; thence north easterly along said river through Giles and Lincoln counties to the eastern boundary of Lincoln county; thence northerly and easterly along the west and northern boundary of Moore county to the north east corner of Moore county; thence north along the western boundary lines of Coffee and Cannon counties to the north west corner of Cannon county; thence north easterly and south easterly along the northern and eastern boundaries to Cannon county to the boundary of Warren county; thence easterly along the northern boundary of Warren county to the western boundary of White county; thence north easterly and south

easterly along the western and northern boundary of White
67 cou-ty to the western boundary of Cumberland county; thence southerly, easterly, and northeasterly along the western, southern, and eastern boundaries of Cumberland county to the northern corner of Rhea county; thence southerly along the eastern boundary line of Rhea and James counties to the north west corner of Bradley county; thence northly and south easterly along the northern boundary line of Bradley and Polk counties to the north north east corner of Polk county; thence south along the eastern boundary line of Polk county to the south east corner thereof at the south western corner of North Carolina.

That portion of the quarantine line of the State of Virginia, described in the order of March 14, 1903, (amendment No. 7 to B. A. L. No. 107) beginning at the south western corner of Virginia (Lee county) and extending east along the southern boundary line of Virginia to the southeastern corner of Washington county is hereby suspended during the enc*ofc*ement of the above line for the State of Tennessee.

And whereas said quarantine line, as above set forth, is satisfactory to this department, and legislation has been enacted by the State of Tennesse to inforce said quarantine line, therefore the above line is adopted for the State of Tennessee by this department for the period beginning with the date of this order and ending December 31, 1903, in lieu of the quaraantine line described in the order of March 13, 1903, for said area, unless otherwise ordered.

It is further ordered that, during the continuance of the above line, cattle now in the western and northern parts of Carroll county may be moved for perposes other than immediate slaughter to *to* States and Territories out side of the quarantine area after having been inspected and found free of infection by an inspector of this department, and upon written permassion by such office.

JAMES WILSON, Secretary.

68 (Amendment No. 5 to B. A. I. Order No. 107.)

Special Order Modifying Quarantine Line for the State of Georgia.

(1903.)

U. S. DEPARTMENT OF AGRICULTURE,
OFFICE OF SECRETARY,
WASHINGTON, D. C., March 14, 1903.

In accordance with the regulations to prevent the spread of splenetic fever of cattle the State of Georgia has agreed to establish and to coöperate in the inforcement of a quarantine located as follows:

Beginning at the intersection of the western boundary line of Union county with the boundary lines between the States of Georgia

and North Carolina; thence southerly along the western boundary of Union county to the south west corner thereof; thence north easterly and easterly along the southern boundary lines of Union and Towns counites to the western corner of Rabun county; thence easterly, south easterly and north easterly along the western, southern, and eastern boundaries of Rabun county to the north east corner of said county on the boundary between Georgia and North Carolina. That portion of the quarantine line for the State of North Carolina described in the order of March 14, 1903 (amendment No. 6 to B. A. I. order No. 107).

Beginning at the intersection of the north west corner of Union county, Georgia, with the State line, extending east along the southern boundary line of North Carolina to the north east corner of Rabun county, is hereby suspended during the inforcement of the above line for the State of Georgia.

And whereas, said quarantine as above set forth is satisfactory to this department, and legislation has been enacted by the State of Georgia to enforce said quarantine line, therefore the above
69 quarantine line is adopted for the State of Georgia by this department for the period beginning with the date of this order and ending December 31, 1903, in lieu of this quarantine line described in the order of March 13, 1903, for said area, unless otherwise ordered.

JAMES WILSON, Secretary.

(Amendment No. 6 to B. A. I. Order No. 107.)

Special Order Modifying Quarantine Line for the State of North Carolina.

(1903.)

U. S. DEPARTMENT OF AGRICULTURE,
OFFICE OF SECRETARY,
WASHINGTON, D. C., March 14, 1904.

In accordance with the regulation to prevent the spread of splenetic fever in cattle, the State of North Carolina has agreed to establish and|to coöperate in the enforcement of a quarantine line located as follows:

Beginning at the south west corner of the county of Cherokee; thence east along the southern boundary line of the counties of Cherokee, Clay, Macon, Jackson, Transylvania and Henderson to the south west corner of the county of Polk; thence northerly along the western boundaries of Polk and Rutherford counties to the southern boundary of McDowell county; thence westerly, northerly and north easterly along the southern, western and northern boundaries of McDowell county to the western boundary of Burt county; thence southerly along the western boundary *of* line of Burke county to the

Catawaba river; thence easterly along the course of said river to the south western corner of Alexander county; thence north along the western boundary of Wilkes county; thence north westerly
70 along the boundary; thence north along the western boundary of said county to the southern boundary of Wilkes county; thence north westerly along the boundary line of Wilkes county to the western corner of said county; thence following the western and northern boundary lines of Wilkes county to the western portion of Surry county; thence north easterly along the western boundary line of Surry county to its intersection with the northern boundary line of the State of North Carolina.

That portion of the quarantine line for the State of Virginia, described in the order of March 14, 1903, (amendment No. 7. to B. A. I. order No. 107), beginning at the south west corner of Grayson county and extending east along the southern boundary line of Virginia to the south eastern corner of said county, is hereby suspended during the inforcement of the above line for the State of North Carolina.

And where said quarantine line, as above set forth, is satisfactory to this department, and legislation has been enacted by the Sta- of North Carolina to enforce said quarantine line, therefore the above quarantine line is adopted for the State of North Carolina by this department for the period beginning with the date of this order, and ending December 31, 190$, in lieu of the quarantine line described in the order of March 13, 1903, for said area, unless otherwise ordered.

It is further ordered, that, during the continuance of the above line, no cattle origonating in the quarantine districts as described in B. A. I. order No. 107, as modified, shall be moved or allowed—moved into the counties of Surry, Wilkes, McDowell, and that part of Burke south of the Catawba river.

And it is further ordered, that no cattle shall be moved or allowed to move from the county- of Surry, Wilkes, McDowell, and that part of Burkes south of Catawba river, to any of that
71 territory in the State of North Carolina lying west and north of said counties, except after having been inspected and found free of infection by duly authorized iuspectors of this department of the State of North Carolina and upon written permission by such officer. No cattle from said counties shall be moved or allowed to be moved to any State or Territory outside of the quarantine district (except as provided for immediate slaughter) unless they have been duly inspected and passed, and permit issued by inspectors of this department, nor until permission has been obtained from the proper officails of the State or Territory to which destined.

JAMES WILSON, Secretary.

(Amendment No. 7 to B. A. I. Order No. 107.)

Special Order Modifying Quarantine Line for the State of Virginia.

(1903.)

U. S. DEPARTMENT,—
OFFICE OF SECRETARY,
WASHINGTON, D. C., March 14, 1903.

In accordance with the regulations to prevent the spread of splenetic fever of cattle, the State of Virginia has agreed to establish and to coöperate in the inforcement of a quarantine line located as follows:

Beginning at the boundary line of Virginia at its south western corner (Lee county); thence east along the southern boundary of Virginia to the south western corner of Patrick county; thence northerly along the western boundary of Patrick and Frank-
72 lin counties to Daniel's run; thence easterly along Daniel's run and the Black Water river to the Staunton river; thence in a south easterly and north easterly direction along the southern and eastern boundaries of Bedford county to the James river; thence following the James river to the south eastern corner of Charles City county; thence northerly and easterly along the western and northern boundaries of James City county to the western boundary of Gloucester county to the York river; thence southerly and northerly along the southern and eastern boundaries of Gloucester county to the north eastern corner of said county; thence easterly and southerly along the northern and eastern boundaries of Mathew's county to the south eastern point of said county; thence south — the northern boundary of Elizabeth City county; thence westerly and northerly along the boundaries of Elizabeth City and Warwick counties to the James river; thence southeasterly along the course of said river to the north west corner of Norfolk county; thence south along the western boundary of said county to its intersection with its northern boundary of North Carolina; thence east along the southern boundary of Norfolk and Princess Ann counties counties to the Atlantic ocean.

And whereas said quarantine line, as above set forth is satisfactory to this department and legislation has been enacted by the State of Virginia to enforce said quarantine line, therefore the above quarantine line is adopted for the State of Virginia, by this department for the period beginning with the date of this order and ending December 31, 1903, in lieu of the quarantine line described in the order of March, 13, 1903, for said area, unless otherwise ordered.

JAMES WILSON, Secretary.

73 (Amendment No. 8 to B. A. I. Order No. 107.)

Feeding Stations in the Quarantine District for Uninfected Cattle.

U. S. DEPARTMENT OF AGRICULTURE,
OFFIRE OF SECRETARY,
WASHINGTON, D. C., March 14, 1903.

It is hereby ordered, that cattle origonating out side north east and west the quarantined district as defined in order of March 13, 1903, (B. A. I. No. 107), and amendments thereto, and which are to be transported by rail through the quarantine districts, may be unloaded for rest, feed and watered into uninfected pens set apart for such cattle at Polk stock yards and Union stock yards, Fort Worth, Texas; Baird, Texas; Southern Pacific Railway stock yards, Los Angeles, Calilornia, Bakerfield, California, and at Salisbury, North Carolina;

Provided, that the cattle are free from southern cattle ticks and have not been unloaded at any place within the quarantine districts. They may be, after unloading into said pens, be re-loaded into the same cars from which unloaded, or into other cleaned and disinfected cars, and reshipped as uninfected cattle.

JAMES WILSON, Secretary.

(Amendment No. 9 to B. A. I. Order No. 107.)

Special Order Permitting Movement of Cattle from Two Northern Tiers of Counties in Arkansas.

U. S. DEPARTMENT OF AGRICULTURE,
OFFICE OF SECRETARY,
WASHINGTON, D. C., March 14, 1903.

74 It is hereby ordered, that B. A. I. order No. 107, dated March 13, 1903, be amended so as to permit the shipment of cattle for purposes other than immediate slaughter from the two northern tiers of counties in the State of Arkansas into non-infected area; provided, that said cattle have remained in the above described counties since January 1, of this year and have been inspected by officers of the Bureau of Animal Industry of this department and found to be free of splenetic or Texas fever, and not to have been exposed to the contagion thereof; that proper facilities have been afforded for making such inspection and that after inspection the cattle shall be shipped without delay and without exposure to the infection of splenetic or Texas fever.

Provided further, that no cattle shall be allowed shipment under this order unless accompanied by written permit issued by an inspector of the Bureau of the Animal Industry, nor shall such

cattle be taken unto any State or Territory contrary to the local regulations, and said permission will be granted only for cattle which are to remain within the State to which destined for three months after arrival.

This order to remain in force until April 1, 1903.

JAMES WILSON, Secretary.

(Amendment No. 10 to B. A. I. Order No. 107.

Special Order Permitting Movement of Cattle from Part of Ponca Indian Reservation.

U. S. DEPARTMENT OF AGRICULTURE,
OFFICE OF SECRETARY,
WASHINGTON, D. C., March 14, 1903.

75 It is hereby ordered, that section 3 of B. A. I. order No. 107, dated March 13, 1903, be amended so as to permit the shipment of cattle for other purposes than immediate slaughter to points in the non-infected area from that portion of the Ponca Indian reservation, Oklahoma, east of the right of way of the Atchison Topeka and Santafee railway, and bounded on the east and north by the Arkansas river and the Salt fork of the Arkansas river; provided, that said cattle have been kept in the above described area since January 1, 1903, and have been inspected by an office- of the Bureau of Animal Industry of this department and found free of splenetic, or Texas fever, and not to have been exposed to the contagion thereof.

And provided further that no cattle shall be allowed shipment from this area unless accompanied by a written permit issued by an officer of the Bureau of Animal Industry; and all such cattle shall be subject to the laws and regulations of the State to which destined. The cars in which said cattle are shipped must be free from infection and satisfactory to the officer supervising the shipment. This order to terminate April 30, 1903.

JAMES WILSON, Secretary.

U. S. DEPARTMENT OF AGRICULTURE,
OFFICE OF THE SECRETARY,
WASHINGTON, D. C., March 14th, 1903.

In consequence of the act of Congress approved February 2, 1903, entitled "An act to enable the Secretary of Agriculture to more effectually suppress and prevent the spread of contagio-s and infectio-s disease of live stock, and for other purposes," it was
76 deemed advisable to revise and re-issue the regulations relating to contagious diseases of animals so they would have the additional power conferred by that act and accordingly the regulations concerning the transportations of southern cattle are reissued.

Advantage have been taken of the op-ertunity of revision to make a few slight additions to that part of the order of a general nature one with reference to the seperation of the pens reserved for southern cattle, from those used for other cattle, another referring to the disinfection of cars in the quarantined district. The special orders modifying the line for certain States are unchanged excepts as dates and references to orders are effected. The order modifying the line for the Territory of Oklahoma shows and alternation in its description, made to conform to the changes that have taken place through the formation of new counties.

JAMES WILSON, Secretary.

(Amendment No. 11 to B. A. I. Order No. 107.)

Special Order Regarding Quarantining of Cattle in Certain Counties of Tennessee and Kentucky.

U. S. DEPARTMENT OF AGRICULTURE,
OFFICE OF SECRETARY,
WASHINGTON, D. C., May 5, 1903.

It is hereby ordered that, as the infection of Texas fever exist- in certain counties in the States of Tennessee and Kentucky, no cattle, shall be moved or allowed to — moved, except as provided for southern cattle for immediate slaughter to any portion of the uninfected area from the counties of Clinton, Wayne and Pulaski of the State of Kentucky, and the counties of Pickett, Jackson,
77 Overton, Fentress, Putnam, and De Kalb, of the State of Tennessee, unless after inspection such cattle are found free of infection. This inspection must be made by duly authorised inspectors of the Bureau of Animal Industry of this department, and movement allowed for other purposes than immediate slaughter only upon written permission by such inspectors.

The special order modifying the quarantine line for the State of Tennessee (amendment No. 4 to B. A. I. order No. 107), is hereby modified in accordance with the above provisions.

WILLIS L. MOORE,
Acting Secretary.

(Amendment No. 12 to B. A. I. Order No. 107.)

Special Order Quaran-ining Part of Rome County, Tennessee.

U. S. DEPARTMENT OF AGRICULTURE,
OFFICE OF THE SECRETARY,
WASHINGTON, D. C., Pept. 1, 1903.

It is hereby ordered, that, as the infection of splenetic fever of cattle has been found to exist in that part of Rome county, Tennes-

see, lying north of the Tennessee and Clinch rivers, no cattle shall be moced or allowed to — move- except for immediate slaughter for southern cattle, to any portion of the uninfected area from said portion of Rome county, unless, after inspection such cattle are found free of infection.

The inspection must be made by duly authorized inspectors of the Bureau of Animal Industry of the department, and movements of cattle for purposes other than immediate slaughter may be made only upon written permission of such inspectors.

78 The special order modifying the quarantine line for the State of Tennessee (amendment No. 4, to B. A. I. order, No. 107), is hereby modified in accordance herewith.

JAMES WILSON, Secretary.

(Amendment No. 13 to B. A. I. Order No. 107.)

Feeding Stations in the Indian Territory for Uninfected Cattle.

U. S. DEPARTMENT OF AGRICULTURE,
OFFICE OF THE SECRETARY,
WASHINGTON, D. C., *Pept.* 24, 1903.

It is hereby ordered, that cattle origonat*i*on out side (north east or west) of the quarantine district, as *fed*ined in the order of March 13, 1903, (B. A. I. order No. 107,) and amendments thereto, and which are to be transported by rail throughout the quarantine district, may be unloaded for rest, feed, and water into uninfected pens set apart for such cattle at the Sapulpa stock yards of the St. Louis and San Francisco railroad, Sapulpa, Indian Territory provided, that the cattle are free from southern cattle ticks and have not been unloaded at any p*a*lce within the quarantine district. They may, after unloading in said pens be reloaded in the same cars from which unloaded, or into other clean and disinfected cars, and re-shipped as uninfected cattle.

JAMES WILSON, Secretary.

79 (Amendment No. 14 to B. A. I. Order No. 107.)

Regulations to Prevent the Spread of Splenetic Fever of Cattle.

Restrictions Modified.

U. S. DEPARTMENT OF AGRICULTURE,
OFFICE OF THE SECRETARY,
WASHINGTON, D. C., October 20, 1903.

It is hereby ordered that said section 3, of B. A. I. order No. 107, dated March 13, 1903, providing *of* the movement of cattle from the quarantine district described by said order and amendment hereto be amended as follows:

From November 1, 1903, to January 31, 1904, inclusive, cattle from said district may be moved for purposes other than for immediate slaughter to the non-infected area within the State of Virginia Tennessee, Texas, and California, and to the States of Missouri, and Kansas and Territories of Arizona and New Mexico, as may be provided for in the regulations of these States and Territories, and after inspection and upon written permission by and inspector of the Bureau of Animal Industry or a duly authorized inspector of the State or Territory to which the cattle are destined, from November the 1, to December the 31, 1903, inclusive, cattle from said districts may be moved to the non-infected area in the Territory of Oklahoma after an inspection and upon written permission by an inspector of the Bureau of Animal Industery. In the absent of such inspector and permission all movements of cattle from the quarantine district to points outside of such district in the above named States and
80 Territories are prohibited, except as provided for immediate slaughter.

'All cattle from the quarantine district destined to points out side of the States and Territories above named may be shipped without inspection between November the 1, 1903, and January 31, 1904, inclusive, and without restriction other than may be enforced by the local regulation at point of destination.

'The re-shipment to any part of the States of Virginia, North Carolina, Tennessee, Texas, and California, and the Territory of Oklahoma, out side of the quarantine district, *are* to any part of the State of Missouri and Kansas and the Territories of New Mexico and Arizona, of any cattle which may have been moved by this order, except by permission of the proper authorities of the State or Territories to which destined, is hereby forbidden.

'It is further ordered, that all stock pens which may have been reserved for the use of cattle of the quarantined districts, prior to November 1, next, shall not be used for the receiving or storing cattle from the quarantined districts which have been inspected and passed, nor for cattle origonating out side of the quarantined district, except when such cattle are intended for immediate slaughter.

J. H. BRIGHAM,
Acticing Secretary.

The above is all the evidence offered heard or refused at the trial thereof, and this is a true and correct bill of exceptions."

"R. J. BUGG, Judge."

(Endorsed :) "Filed Nov. 4" 1904, B. T. Huey, cl'k."

81 Be it further remembered that on the 31st. day of December, 1904, the defendant in error, J. U. McKendree, filed his answer and response to the petition for writ of error filed herein by plaintiff in error, Illinois Central Railroad Company, and the same is in words and figures as follows, to-wit :

"The Supreme Court of the United States.

ILLINOIS CENTRAL RAILROAD COMPANY, Plaintiff in Error.
vs.
J. U. McKENDREE, Defendant in Error.
} Answer to Petition in Error.

The above named J. U. McKendree, defendant in error, says for answer and response to the petition for writ of error, of the plaintiff in error, Illinois Central Railroad Company conceiving himself aggrieved by reason of the fact that the plaintiff in error, *have* instituted the aforesaid writ of error and prays an appeal to the Supreme Court of the United States because of the fact that the defendant in error has no money; is absolutely unable to employ counsel to brief his case or to cite law in support thereof.

Wherefore he prays that the honorable court will protect his interest herein and adjudge unto him his cost and sustain the judgment and all other proper relief."

J. U. McKENDREE."

(Endorsed:) "Filed, Dec. 31st. 1904, B. T. Huey, cl'k."

82 COMMONWEALTH OF KENTUCKY, Carlisle Circuit Court, } *sct.*:

I, B. T. Huey, clerk of the Carlisle circuit court of Kentucky hereby certify that the preceeding eighty pages contain a true and complete transcript of the record and proceedings had in State court in the action of J. U. McKendree plaintiff against Illinois Central Railroad Company defendant, together with a certificate signed by the Hon. R. J. Bugg, judge of the Carlisle circuit court, under date of December 21, 1904, and the original writ of error (a copy of which is on file in my office) and copies of the petition for writ of error allowed by Hon. R. J. Bugg on December 21, 1904, and the assignment of errors accompanying such petition together with the certificate or memorandum signed by Hon. R. J. Bugg allowing the writ and a copy of the bond with supersedeas herein approved by the Hon. R. J. Bugg, and answer of def't in error, all of which appear of record and on file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of my office. Done at Bardwell in Carlisle county, Kentucky this December 31, 1904.

[Seal Carlisle Circuit Court, Kentucky.]

B. T. HUEY,
Clerk Carlisle Circuit Court for
Carlisle County, Kentucky.

Clerk's fee for copy of record:—25500 at 1c. for 10 words..... $25.50
Seal..... 1.00

$26.50

Attest: B. T. HUEY, C. C. C. C.

83 UNITED STATES OF AMERICA:

The President of the United States to J. U. McKendree, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Carlisle circuit court wherein Illinois Central Railroad Company is plaintiff in error and J. U. McKendree is defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable R. J. Bugg, judge of the Carlisle circuit court, of Kentucky, this the 21st day of December, in the year of our Lord one thousand nine hundred and four.

R. J. BUGG,
Judge of the Carlisle Circuit Court of Kentucky.

84 [Endorsed:] Illinois Central R. R. Co. *vs.* J. U. McKendree Citation upon writ of error. Copy.

Executed in full by delivering a copy of the within citation to J. U. McKendree this Dec. 24th 1904.

JAY WILLINGHAM, S. C. C.
By R. W. ROWLAND, D. S.

85 Supreme Court of the United States.

ILLINOIS CENTRAL RAILROAD COMPANY, Plaintiff in Error,
vs.
J. U. MCKENDREE, Defendant in Error.
} Stipulation.

In the above styled cause docketed in this court upon writ of error to the Carlisle circuit court for Carlisle county, Kentucky, it is hereby stipulated and agreed between the parties as follows:

This cause with the consent of this court shall be heard and determined in this court only upon the following Federal questions, viz:

First. As to the validity of the act or acts of Congress so far as same might be construed as purporting to delegate to the Secretary of Agriculture power to make or to promulgate the regulations actually made by him shown in the record herein as the basis of the claims asserted by the defendant in error against the plaintiff in error it being contended on behalf of the plaintiff in error and denied by the defendant in error that such acts of Congress if so construed are in excess of the powers conferred upon Congress

by the Constitution of the United States and for that reason null and void.

Second. As to the power of the Secretary of Agriculture or of the acting Secretary of Agriculture under the Constitution of the United States or the acts of Congress aforesaid to make or to promulgate the regulations actually made and promulgated by them shown in the record herein as the basis of the claims asserted by the defendant in error against the plaintiff in error.

Third. As to whether or not under the acts of Congress and the regulations set forth in the record herein the defendant in error had or has any right to maintain a civil action against the plain-
86 tiff in error for the subject matter claimed by him in this cause.

Such Federal questions upon which this cause shall be heard and determined in this court are more fully set forth in the certificate filed herein by R. J. Bugg, presiding judge of the Carlisle circuit court before the allowance of the writ of error herein. All other questions are hereby expressly waived by the parties so far as they have power to waive same.

Witness the hands of the parties this 28 day of February, 1905.

NICHOLS & SON, Att'ys.
J. U. McKENDREE.
WICKLIFFE & WILEY, Att'ys.
ILLINOIS CENTRAL RAILROAD COMPANY,
By EDMUND F. TRABUE, Attorney.
J. U. McKINDREE,
By J. B. WICKLIFFE, Att'y.

87 [Endorsed:] File No. 19,615. Supreme Court U. S. October term, 1904 Term No. 515. Illinois Central Railroad Co. pl'ff in error *vs.* J. U. McKendree. Stipulation as to questions upon which this cause is to be heard & determined. Filed April 26" 1905.

Endorsed on cover: File No. 19,615 Kentucky Carlisle county circuit court. Term No. 168 Illinois Central Railroad Company, plaintiff in error, *vs.* J. U. McKendree. Filed January 25th, 1905. File No. 19,615.

Office Supreme Court U. S.
FILED
DEC 14 1905
JAMES H. MCKINNEY,
Clerk.

FILE COPY.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1905.

No. [illegible]8.13

ILLINOIS CENTRAL RAILROAD COMPANY,
Plaintiff in Error,

vs.

J. U. McKENDREE,
Defendant in Error.

In Error to the Circuit Court of Carlisle County, State of Kentucky.

BRIEF IN BEHALF OF PLAINTIFF IN ERROR.

J. M. DICKINSON,
EDMUND F. TRABUE,
BLEWETT LEE,
Counsel for Plaintiff in Error.

THE GUNTHORP-WARREN PRINTING CO., 116 RANDOLPH STREET, CHICAGO

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 168.

ILLINOIS CENTRAL RAILROAD COMPANY,
Plaintiff in Error,
vs.
J. U. McKENDREE,
Defendant in Error.

In Error to the Circuit Court of Carlisle County, State of Kentucky.

BRIEF IN BEHALF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

The question involved in this case is whether an interstate carrier is liable to a civil action for violating a regulation of the Secretary of Agriculture forbidding the transportation of cattle northwards across a certain line running through the body of the State of Tennessee.

Defendant in error February 3, 1904, sued plaintiff in error, a common carrier operating a railroad from New Orleans to Chicago, through Carlisle County, Ken-

tucky, claiming that on July 11, 1903, plaintiff in error received one or more cars of infected cattle, and transported them to Arlington, in Carlisle County, Kentucky, and unloaded them July 13, 1903, in its stock pens in said town, where cattle running on the commons, "where they had a right to run," could and did come in contact with the infected cattle and contracted Texas Cow Fever. "That the company knew, or could have known with reasonable care" that the cattle had infectious germs when unloaded. "They having brought them from an infected district, knowing and in open conflict with well known quarantine laws," and that while in said stock pens defendant's cows came into contact with them and contracted the fever, to his damage in the sum of eighty dollars. (Rec., 1.)

February 23, 1904, the general demurrer of plaintiff in error filed February 19, 1904, being overruled, it filed its answer traversing the allegations of the petition. (Rec., 3.)

June 8, 1904, plaintiff in error filed an amended answer, as follows:

"Further answering herein, the defendant says that the claims of the plaintiff herein asserted are based upon a certain alleged act of Congress of the United States of America approved February 2, 1903, 'entitled an act to enable the Secretary of Agriculture to more effectually suppress and prevent spread of contagious and infectious diseases of live stock and for other purposes,' which act is published and contained in volume 32 United States Statutes at Large, beginning at page 791, and also in a supplement to the United States Compiled Statutes issued in 1903, by the West Publishing Company, St. Paul, Minnesota, beginning at page 372 of said volume, and said claims are further based upon certain alleged regulations adopted

and promulgated by the Secretary of Agriculture on March 13, 1903, pursuant to the authority attempted to be conferred upon him by said alleged act of Congress above mentioned approved February 2, 1903.

"The defendant says that said act of Congress hereinbefore mentioned and said regulations adopted by the Secretary of Agriculture as hereinbefore stated are each and all of them repugnant to and in contravention of the Constitution of the United States of America and is in excess of the powers of Congress and of the Secretary of Agriculture under the Constitution of the United States, and they are each and all, therefore, unconstitutional and void, and under the Constitution of the United States this defendant has the right, privilege and immunity of being exempt from the assertion or prosecution of any claims against it based upon or arising under such act of Congress or said regulations, or any of them, and this defendant as permitted by Section 709 of the Revised Statutes of the United States, hereby specially sets up and claims and pleads in defense of this action the right and privilege and immunity which is secured to it by the Constitution of the United States to be exempt from all suits and prosecutions and all claims against it based upon or arising under such unconstitutional and void act of Congress and regulations adopted or promulgated by the Secretary of Agriculture." (Rec., 3, 4.)

June 8, 1904, defendant in error filed a general demurrer to the answer as amended. (Rec., 4.)

June 10, 1904, he filed an amended petition, the affirmative allegations whereof were controverted. The petition is as follows (Rec., 5):

"The plaintiff, J. U. McKindree, comes and by leave of the court amends his petition and says, that the defendant, Illinois Central Railroad Company, on the 13th day of June, 1903, received one car of cattle at Grand Junction, Tennessee, to be transported to the Town of Arlington, Kentucky, and on the 13th day

of said month unloaded them in the stock pens in *said* town.

That the Town of Arlington is a small town, located on defendant's road in this, Carlisle County, and defendant's stock pens are located adjacent to the public highway, and commons, and that Grand Junction, Tennessee, is located on defendant's road and south of the quarantine line that was established on the 14th day of March, 1903, by and under the existing quarantine laws, and that said quarantine line, 'beginning on the Mississippi River at the southeast corner of the State of Missouri at the western boundary of Tennessee. [Here follows a description of the quarantine line through the body of the State of Tennessee as set forth in amendment No. 4 to B. A. I. Order No. 107, which will be found at Rec., 34.] And that the defendants received said cattle south of said quarantine line, and transported them north and out of a quarantine district, and south of the said quarantine line, and transported them north through the State of Tennessee into this county and state, and unloaded them in the Town of Arlington and placed them in their stock pens adjacent to the public highway and commons, where plaintiff's cows came in contact with the germ of Texas cow fever that said cattle had on them when put in the pens as aforesaid; that said stock pens were suffered and permitted to remain open and exposed to cattle after the removal of said cattle without disinfecting, or any other effort to protect exposed stock, and plaintiff's cows contracted Texas cow *fever* from said germs produced from said cattle while in said stock pens, to the damage of plaintiff.

Wherefore he prays as in his original petition."

On June 16, 1904, the demurrer to the amended answer of plaintiff in error was sustained, to which it excepted, and issue being joined, the jury was sworn, a trial had, and a verdict for defendant in error returned, upon which the court rendered judgment for

sixty-five ($65) dollars, with interest from October 24, 1904, and costs. (Rec., 12 and 13.)

October 24, 1904, plaintiff in error filed grounds for a new trial. (Rec., 7, 8.)

The motion for a new trial was overruled October 25, 1904, and bill of exceptions filed November 4, 1904. (Rec., 8.)

The court instructed the jury (Nos. 1, 2 and B) as follows:

"The court instructs the jury that if they believe from the evidence that the cattle shipped to Arlington, Kentucky, from Grand Junction, Tennessee, by J. A. Jones through the defendant, Illinois Central Railroad Company, were infected with the disease known as Texas fever and that through and by reason of such disease, if any, of said Jones' cattle, the two cows of plaintiff were infected and died therefrom, then you will find for plaintiff the reasonable cash value of said two cows, not exceeding the sum of eighty dollars. (*Given.*)"

No. 2 in words and figures as follows:

"The court instructs the jury that unless you believe from the evidence plaintiff's cows caught an infectious disease from the Jones cattle and died therefrom, the law is for the defendant, and you should so find, although you may further believe from the evidence that the Jones cattle had the infectious disease known as Texas fever. (*Given.*)"

(To the giving of which instructions defendant objected and excepted.)

And the court on the motion of the defendant gave instruction "B" to the jury, which is in words and figures as follows:

"The court instructs the jury that they cannot find for plaintiff unless the cattle shipped by J. A. Jones

over defendant's railroad and unloaded at Arlington had Texas fever or Texas ticks; nor can the jury find for plaintiff, although they may believe said Jones' cattle were infected by Texas fever or Texas ticks, unless they further believe that plaintiff's cattle contracted the disease from said Jones' cattle, while the latter were in the pens of defendants at Arlington. (*Given.*)"

December 23, 1904, the presiding judge filed in the office of his clerk his certificate, as follows:

"I, R. J. Bugg, sole presiding judge of the Circuit Court of Carlisle County, in the State of Kentucky, now and at the time of the trial of the above entitled cause, do hereby certify:

That upon the trial of said cause the defendant, Illinois Central Railroad Company, relied for its defense upon certain rights, privileges and immunities specially claimed by it under the Constitution of the United States of America, and it insisted upon its said rights, privileges and immunities throughout the trial of said action and in the assertion of them it claimed and contended that the various regulations and orders made and promulgated by the Secretary of Agriculture and offered in evidence on behalf of the plaintiff herein over the objections of defendant were unconstitutional, null and void as being in excess of the powers conferred or which could be conferred by act of Congress upon the Secretary of Agriculture under the Constitution of the United States of America, and that the said act of Congress approved February 2, 1902, under which the Secretary of Agriculture assumed to promulgate said orders and regulations was itself unconstitutional, null and void as being in conflict with the Constitution of the United States of America and in excess of the powers conferred by it upon the Congress.

"Said defendant, Illinois Central Railroad Company, further contended throughout the trial of said cause that no right of action against it accrued to the plaintiff by reason of any of the alleged regulations or orders made or promulgated by the Secretary of Agri-

culture, and offered in evidence upon the trial of this action, or by reason of the alleged failure on the part of the defendant to observe or to comply with any of said regulations or orders on the ground that the said regulations or orders did not assume or attempt to give, and that the said act of Congress did not assume or attempt to give, to the plaintiff herein or to any other in like situation a remedy by way of civil action against the defendant herein for its alleged breach of any of said regulations or orders made or promulgated by the Secretary of Agriculture, and throughout the trial of said action the defendant, Illinois Central Railroad Company, specially set up and claimed, even if said act of Congress and said regulations and orders were valid under the Constitution and laws of the United States, still it had a right, privilege or immunity under the said act of Congress or the said regulations or orders from any liability to the plaintiff, J. U. McKendree, in a civil action for damages claimed on account of its alleged breach of said regulations or orders.

"In allowing the said regulations or orders of the Secretary of Agriculture to be given in evidence before the jury and in overruling the motion of defendant to peremptorily instruct the jury to return a verdict in its favor, the Carlisle Circuit Court disallowed the various contentions made as above stated on behalf of the Illinois Central Railroad Company, and denied the claims made by it of the rights, privileges or immunities specially claimed by it as above stated, and held that the various claims made by it were not well founded in law under the Constitution and laws of the United States of America, and the claims of the plaintiff herein was established and a judgment in his favor rendered solely by reason of defendant's alleged breach of said regulations and orders.

"I do further certify that under the laws of the State of Kentucky the Carlisle Circuit Court is the highest court of said state in which said cause can be reviewed or tried or decision therein had, and that there is no court of the State of Kentucky having jurisdiction

under its laws to review or reverse its judgment in this cause.

"Given under my hand as sole presiding judge of the Carlisle Circuit Court during the entire time of the pendency of the above entitled cause in said cause, this 21st day of December, 1904."

As appears by said certificate, Hon. R. J. Bugg was sole presiding judge of the Carlisle Circuit Court, the court of last resort in the state in cases involving the amount of judgment.

December 23, 1904, plaintiff in error sued out its writ of error (Rec., 11) and filed its assignment of errors as hereinafter recited (Rec., 24, *et seq.*).

December 21, 1904, the writ of error was duly allowed. (Rec., 15.)

By the testimony it appeared that the cows of plaintiff below ran on the "commons," the land belonging to plaintiff in error. (Testimony of defendant in error, Rec., 19.) That they were supposed to have come in contact in some way with the cattle transported by plaintiff in error from Grand Junction, a point south of the quarantine line described in the amended petition of defendant in error, and transported to Arlington aforesaid in Kentucky.

There was no evidence that the cattle were infected when received for transportation, nor that plaintiff in error had any intimation of any such infection, nor any guilt of anything except receiving cattle from a point south of the quarantine line established by the Department of Agriculture for transportation to a point north of said line. No question of negligence was involved, or of liability, apart from the violation of quarantine regulations.

March 13, 1903 (Rec., 25) the Secretary of Agriculture promulgated B. A. I. Order 107, establishing a quarantine line from west to east throughout the United States from California to Maryland, and forbidding the transportation of cattle from points south to points north of said line, except as in said order specified. (Rec., 26.)

By Section 9 of said order (Rec., 28) it is provided:

"Violation of these regulations is punishable by a fine of not less than one hundred dollars nor more than one thousand dollars, or by imprisonment not more than one year, or by both such fine and imprisonment."

No right of action is afforded by any provision of the order to anyone injured by violation of the order.

By amendment No. 4, March 14, 1904 (Rec., 34), it is provided that the quarantine line established, and the legislation to enforce it, by the State of Tennessee, being satisfactory to the Secretary of Agriculture, is adopted as the Federal quarantine line. The line thus adopted runs from west to east through the State of Tennessee, *not conforming to any boundary of said state.* B. A. I. order number 107 and amendments 1 to 15 to said order were admitted in evidence for the plaintiff over the defendant's objection and exception. (Rec., 24-43.)

The United States statute pursuant to which these orders or regulations are made is the Act of February 2, 1903, c. 349 (32 Stat. L., 791), United States Compiled Statutes, 1901, Supp. 1905, page 613, as follows:

"Be it enacted, etc., that in order to enable the Secretary of Agriculture to effectually suppress and extirpate contagious pleuropneumonia, foot and mouth disease, and other dangerous, contagious, infectious

and communicable diseases in cattle and other live stock, and to prevent the spread of such diseases, the powers conferred on the Secretary of the Treasury by sections four and five of an act entitled 'An Act for the establishment of a Bureau of Animal Industry, to prevent the exportation of diseased cattle, and to provide means for the suppression and extirpation of pleuropneumonia and other contagious diseases among domestic animals,' approved May 29, 1884 (23 United States Statutes, 31), are hereby conferred on the Secretary of Agriculture, to be exercised exclusively by him. He is hereby authorized and directed, from time to time, to establish such rules and regulations concerning the exportation and transportation of live stock from any place within the United States where he may have reason to believe such diseases may exist into and through any state or territory, including the Indian Territory, and into and through the District of Columbia and to foreign countries, as he may deem necessary, and all such rules and regulations shall have the force of law. Whenever any inspector or assistant inspector of the Bureau of Animal Industry shall issue a certificate showing that such officer had inspected any cattle or other live stock which were about to be shipped, driven, or transported from such locality to another, as above stated, and had found them free from Texas or splenetic fever infection, pleuropneumonia, foot and mouth disease, or any other infectious, contagious, or communicable disease such animals so inspected and certified may be shipped, driven or transported from such place into and through any state or territory, including the Indian Territory, and into and through the District of Columbia, or they may be exported from the United States without further inspection or the exaction of fees of any kind, except such as may at any time be ordered or exacted by the Secretary of Agriculture; and all such animals shall at all times be under the control and supervision of the Bureau of Animal Industry of the Agricultural Department for the purposes of such inspection.

"Sec. 2. That the Secretary of Agriculture shall

have authority to make such regulations and take such measures as he may deem proper to prevent the introduction or dissemination of the contagion of any contagious, infectious, or communicable disease of animals from a foreign country into the United States or from one state or territory of the United States or the District of Columbia to another, and to seize, quarantine, and dispose of any hay, straw, forage, or similar material, or any meats, hides, or other animal products coming from an infected foreign country to the United States, or from one state or territory or the District of Columbia in transit to another state or territory or the District of Columbia whenever in his judgment such action is advisable in order to guard against the introduction or spread of such contagion.

"Sec. 3. That any person, company or corporation knowingly violating the provisions of this act or the orders or regulations made in pursuance thereof shall be guilty of a misdemeanor, and on conviction shall be punished by a fine of not less than one hundred dollars nor more than one thousand dollars, or by imprisonment not more than one year, or by both such fine and imprisonment."

The following stipulation of counsel appears at Rec. 45:

"This cause with the consent of this court shall be heard and determined in this court only upon the following Federal questions, viz.:

First. As to the validity of the act or acts of Congress so far as same might be construed as purporting to delegate to the Secretary of Agriculture power to make or promulgate the regulations actually made by him shown in the record herein as the basis of the claims asserted by the defendant in error against the plaintiff in error, it being contended on behalf of the plaintiff in error and denied by the defendant in error that such acts of Congress if so construed are in excess of the powers conferred upon Congress by the Constitution of the United States, and for that reason null and void.

Second. As to the power of the Secretary of Agriculture or of the acting Secretary of Agriculture under the Constitution of the United States or the acts of Congress aforesaid to make or promulgate the regulations actually made and promulgated by them shown in the record herein as the basis of the claims asserted by the defendant in error against the plaintiff in error.

Third. As to whether or not under the acts of Congress and the regulations set forth in the record herein the defendant in error had or has any right to maintain a civil action against the plaintiff in error for the subject-matter claimed by him in this cause.

Such Federal questions upon which this cause shall be heard and determined in this court are more fully set forth in the certificate filed herein by R. J. Bugg, presiding judge of the Carlisle Circuit Court, before the allowance of the writ of error herein. All other questions are hereby expressly waived by the parties so far as they have power to waive same."

ASSIGNMENT OF ERRORS.

I.

"Said Carlisle Circuit Court for Carlisle County, Kentucky, erred to the prejudice of the plaintiff in error, Illinois Central Railroad Company, in allowing the defendant in error, J. U. McKendree, over the objections of the plaintiff in error to offer and give in evidence before the jury upon the trial of the above mentioned cause in the said Carlisle Circuit Court the said orders and regulations made and promulgated by the Secretary of Agriculture of the United States of America and amendments thereto made and promulgated by the said Secretary of Agriculture and by the acting Secretary of Agriculture of the United States of America which orders and regulations were and are designated as B. A. I. order No. 107 made and promulgated by the

Secretary of Agriculture on March 13, 1903, and the amendments thereto numbered respectively 1 to 15, both inclusive, made and promulgated respectively on March 14, 1903, May 5, 1903, September 1, 1903, September 24, 1903, and October 20, 1903, by the said Secretary of Agriculture and the said acting Secretary of Agriculture—in or by which said orders or regulations above mentioned it was attempted to be provided that a Federal quarantine line should be established across the United States of America running in an irregular manner from the Pacific ocean to the Atlantic ocean and extending through the State of Tennessee in a generally eastwardly and westerly direction in such a manner as to divide said State of Tennessee into two parts, and in and by which said orders and regulations and amendments thereto it was attempted to be provided that the transportation of cattle from the area south of or below said Federal quarantine line above mentioned to any portion of the United States above, north, east or west of said Federal quarantine line should be prohibited and forbidden except upon certain conditions and subjected to certain restrictions and regulations therein prescribed.

Said Carlisle Circuit Court further erred in said matter in permitting defendant in error upon the trial of said cause to give in evidence over the objections of plaintiff in error, each and every one of the regulations or orders or amendments thereto made and promulgated as above set forth.

To such ruling of the Carlisle Circuit Court in permitting each and all of said orders and regulations and amendments thereto to be given in evidence at the trial of said action the plaintiff in error throughout the trial objected and excepted and it still objects and excepts thereto.

II.

Said Carlisle Circuit Court further erred in said matter in sustaining the demurrer of the defendant in error, J. U. McKendree, to so much of the answers

as amended of the plaintiff in error, Illinois Central Railroad Company, as specially set and claimed rights, privileges and immunities under the Constitution and under the laws of the United States of America, to which ruling of the said court plaintiff in error objected and excepted throughout the trial and still objects and excepts.

III.

Said Carlisle Circuit Court further erred in said matter in holding and deciding against the protest and objections of the plaintiff in error, Illinois Central Railroad Company, that the said Secretary of Agriculture was empowered under the act of Congress approved February 2, 1903, entitled 'An act, to enable the Secretary of Agriculture to more effectually suppress and prevent the spread of contagious diseases of live stock, and for other purposes' (which act is published and contained in volume 32 United States Statutes at Large, beginning at page 791), to adopt or promulgate or enforce any or all of the regulations or orders aforesaid or amendments thereto and in so holding and deciding the said Carlisle Circuit Court for Carlisle County, Kentucky, erred in denying the contentions made throughout the trial of said action on behalf of plaintiff in error to the effect that under the Constitution of the United States of America it had a privilege and immunity and exemption from any liability or proceeding of any character based upon the orders and regulations aforesaid.

IV.

Said Carlisle Circuit Court further erred in said matter in holding and deciding against the protest and objections of the plaintiff in error, Illinois Central Railroad Company, that the Congress of the United States of America is or was empowered by the Constitution of the United States of America to confer upon

the Secretary of Agriculture authority to adopt or to promulgate or to enforce the said orders, rules or regulations, or any of them, or any amendments thereto, and in so holding and deciding the Carlisle Circuit Court erred to the prejudice of the plaintiff in error, Illinois Central Railroad Company in denying the claims specially set up by it throughout the trial of said action to a privilege, immunity and exemption specially claimed by it under the Constitution of the United States from any liability or proceeding under any of the orders, rules and regulations aforesaid.

V.

Said Carlisle Circuit Court further erred in said matter to the prejudice of the plaintiff in error, in holding and deciding that any cause of action whatever accrued to the defendant in error, J. U. McKendree by reason of any alleged violation or breach of any of the orders, rules and regulations aforesaid or amendments thereto even if same could be regarded or treated as valid. In so doing the Carlisle Circuit Court denied the contentions made on behalf of the plaintiff in error, Illinois Central Railroad Company, throughout the trial of said cause, and denied its claim of exemption from any proceeding under the Constitution or laws of the United States of America by reason of the facts alleged or sought to be proven by the defendant in error, J. U. McKendree, upon the trial of said action, which said rights, privileges and exemptions were specially set up and specially claimed by the plaintiff in error throughout the trial of said action in the Carlisle Circuit Court.

VI.

Said Carlisle Circuit Court further erred in said matter to the prejudice of the plaintiff in error, Illinois Central Railroad Company, in rendering a judgment in favor of the defendant in error, J. U. McKen-

dree, against the said plaintiff in error for the sum of sixty-five dollars ($65.00) and interest or for any sum based upon the claim of a failure on the part of plaintiff in error to observe or to comply with the rules, regulations and orders on amendments thereto promulgated as aforesaid by the Secretary of Agriculture and by the Acting Secretary of Agriculture."

BRIEF.

THE JURISDICTION OF THE COURT.

Upon the question of jurisdiction the case is very similar to *Missouri, Kansas & Texas Railway* v. *Haber*, 169 U. S., 613, 621 (1898). In that case an action for damages was brought in a Kansas court on account of the communication of Texas fever to the plaintiff's cattle. The action was based upon a Kansas statute authorizing it and covering cattle transported from other states. At page 621 this court said:

"1. The answer of the railway company as well as its requests for instructions, and the opinion of the Supreme Court of the State, show that the company contended throughout this litigation that legislation by Congress and the regulations prescribed by the Secretary of Agriculture in execution of the Animal Industry Act, furnished a complete defense to all claims for damages asserted in this action. That contention was overruled by the trial court, as well as by the Supreme Court of the State. If the contention of the railway company had been sustained, the verdict and judgment must have been in its favor without reference to any other question in the case. In other words, the state court could not properly have disposed of the case without deciding the Federal question raised by the company. This court therefore has jurisdiction to inquire whether the Supreme Court of Kansas erred in holding that the legislation of Congress and the regulations of the Secretary of the Interior gave to the railway company the right, privilege and immunity specially set up and claimed by it. The motion to dismiss for want of jurisdiction in this court is consequently overruled. *Wilson* v. *Black Bird Creek Marsh Co.*, 2 Pet., 245, 251; *Chicago Life Ins. Co.* v. *Needles*, 113 U. S., 574, 579; *Sayward* v. *Denny*, 158 U. S., 180, 184; *Chicago, Burlington & Quincy Railroad* v. *Chicago*, 166 U. S., 226, 232."

In that case the recovery based upon the Kansas statute was sustained. In the case at bar the action is not based upon a state statute nor upon the common law, but upon violation of Federal quarantine regulations. (Original Complaint, Rec., 1; Amended Complaint, Rec., 5.)

The defendant demurred generally to the original petition. (Rec., 2.) The demurrer being overruled the defendant specially answered that the quarantine regulations adopted by the Secretary of Agriculture were repugnant to the Constitution of the United States, and in accordance with Sec. 709 of the United States Rev. Stat. specially claimed the right, privilege and immunity of exemption from any claims based upon the act of Congress or the regulations made thereunder. (Rec., 4.) The federal questions were also raised by the admission in evidence of the regulations in question (Rec., 24), and by the instructions of the court imposing absolute liability in case the cattle brought from Tennessee to Kentucky by the defendant were in fact infected and imparted Texas fever to the plaintiff's cows. (Rec., 9.) The same questions are raised by the motion for a new trial. (Rec., 8.) The certificate of the presiding judge also shows that the defendant set up and claimed its rights, privileges and immunities under the Constitution and laws of the United States. (Rec., 10.)

The clause of the Constitution involved in the case is "The Congress shall have power * * * to regulate commerce with foreign nations, among the several states, and among the Indian tribes." (Art. 1, Sec. 8, Par. 3.)

It was said by Mr. Justice Harlan in delivering the opinion of the court in the case of *Reid* v. *Colorado*, 187 U. S., 137, 151 (1902):

"Now, it is said that the defendant has a right under the Constitution of the United States to ship live stock from one state to another state. This will be conceded on all hands. But the defendant is not given by that instrument the *right* to introduce into a state, against its will, live stock affected by a contagious, infectious or communicable disease, and whose presence in the state will or may be injurious to its domestic animals. The state—Congress not having assumed charge of the matter as involved in interstate commerce—may protect its people and their property against such dangers, taking care always that the means employed to that end do not go beyond the necessities of the case or unreasonably burden the exercise of privileges secured by the Constitution of the United States."

The case at bar is one where no state statute is involved, where neither Congress nor the State Legislature has conferred the right of action claimed by the plaintiff, and where the defendant's constitutional right, to ship live stock from one state to another so far as not forbidden by law, was denied. The defendant claims nothing more than that, until forbidden by a valid law either of the United States or of the state, the defendant has the right in transacting interstate commerce to bring cattle from Tennessee into Kentucky, which cattle the defendant did not know, or have reasonable ground to know, were infected.

The defendant's right is based not only upon the Constitution of the United States, but also upon Section 5258 of the Revised Statutes, the first sentence of which is as follows:

"Every railroad company in the United States, whose road is operated by steam, its successors and

assigns, is hereby authorized to carry upon and over its road, boats, bridges and ferries, all passengers, troops, government supplies, mails, freight, and property on their way from any state to another state, and to receive compensation therefor, and to connect with roads of other states so as to form continuous lines for the transportation of the same to the place of destination."

Under this statute the defendant claims simply that until forbidden to do so by some valid law it is not liable for transporting live stock from one state to another state in the absence of negligence, although in fact such stock may have been infected or likely to communicate disease.

The Federal questions presented by the record are really four in number.

First. The defendant not being negligent is entitled to immunity from liability on account of the transportation of live stock from one state to another in the absence of any valid law or regulation imposing liability therefor.

Second. The defendant in the transaction of interstate commerce has the privilege or immunity of exemption from regulations of interstate commerce made not by Congress, but by the Secretary of Agriculture.

Third. The defendant under the circumstances described is also entitled to exemption from regulations of commerce by any Federal authority which regulate intra-state commerce as well as interstate commerce.

Fourth. The defendant acting without negligence is entitled to exemption from any civil action on account of doing the acts forbidden by the Secretary of

Agriculture under the particular statutes of February 2, 1903, and May 29, 1884.

Since the passage quoted from the opinion of Justice Harlan in the case of *Reid* v. *Colorado, supra,* it seems unnecessary to accumulate authorities upon the proposition that (no question of negligence arising) except as forbidden by a valid law the defendant had the right under the Constitution of the United States to transport live stock from Tennessee to Kentucky. The appellant will therefore address itself directly to the proposition that the statutes and regulations relied upon as depriving the defendant of this privilege in the particular case are not sufficient to deprive the defendant of this right or to justify an action against the defendant for its exercise. The discussion naturally divides itself into three heads.

1. Congress had no power to delegate to an executive officer, or any other officer, the right to prescribe an offense against the United States or a penalty for commission of such offense.

2. If Congress had power to delegate to an executive officer the authority to prescribe an offense against the United States, such authority must be exercised within the constitutional limits of congressional power, which in this instance is circumscribed by the limits of the authority of Congress to regulate commerce among the several states.

3. A just construction of the Acts of Congress above cited and the regulations of the executive officers aforesaid enacted pursuant to such Acts of Congress, if valid at all, are enforceable only through the imposition

of penalties, and confer no right of private action upon any individual supposed to be injured by violation of such statutes or regulations.

I.

Our first proposition involves two elementary principles, namely, that Congress being entrusted by the Constitution with the legislative power of the United States, must exercise, and not delegate it; and that if it could delegate it, it could not confide it to an executive officer. See *Hayburn's Case*, 2 Dallas., 410 (1792).

In *Morrill* v. *Jones*, 106 U. S., 466 (1882), this court held that the Secretary of the Treasury could not be authorized to alter or amend, by his regulations, a revenue law nor insert into a statute a limitation which Congress did not prescribe. Congress, by statute, exempted from duty animals imported for breeding purposes, under such regulations as the Secretary of the Treasury might prescribe. The Secretary directed customs officers to admit animals only when satisfied that they were "of superior stock, adapted to improving the breed in the United States." This court holding unauthorized the action of the Secretary, said (page 467):

"The Secretary of the Treasury cannot, by his regulations, alter or amend a revenue law. All he can do is to regulate the mode of proceeding to carry into effect what Congress has enacted. In the present case, we are entirely satisfied the regulation acted upon by the collector was in excess of the power of the Secretary. The statute clearly includes animals of all classes. The regulation seeks to confine its operation to animals of 'superior stock.' This is manifestly an

attempt to put into the body of the statute a limitation which Congress did not think it necessary to prescribe. Congress was willing to admit, duty free, all animals specially imported for breeding purposes; the Secretary thought this privilege should be confined to such animals as were adapted to the improvement of breeds already in the United States. In our opinion the object of the Secretary could only be accomplished by an amendment of the law. That is not the office of a treasury regulation."

In *Field* v. *Clark*, 143 U. S., 649, 692 (1891), this court, considering the Tariff Act of October 1, 1890, declared:

"That Congress cannot delegate legislative power to the President is a principal universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."

But, held that the act in question did not violate the principle; that what the President was by the Act required to do was simply in execution of the Act. It said (693):

"It was not the making of law. He was the mere 'agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect. * * * The true distinction,' as Judge Ranney, speaking for the Supreme Court of Ohio, has well said, 'is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.' "

After reviewing the authorities indicating what power could be confided by the legislature to other persons, this court, citing *Locke's Appeal*, 72 Penn. St., 491, 498, continued (694):

"The proper distinction, the court said, was this:

'The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the law-making power, and, must, therefore, be a subject of inquiry and determination outside of the halls of legislation.' "

In *United States* v. *Eaton*, 144 U. S., 677 (1892), Eaton was indicted for violating a regulation of the Commissioner of Internal Revenue, sanctioned by the Secretary of the Treasury, for enforcing the Act of Congress of August 2, 1886, covering the manufacture and sale of oleomargarine. The Circuit Court certified to this court questions upon which the judges were divided in opinion, *viz.:*

1. Whether a wholesale dealer in oleomargarine knowingly failing to keep a book showing the oleomargarine received, from whom received, that disposed of, and to whom sold as required by the commissioner's ruling, was liable to the penalty imposed by the Act.

2. Whether such dealer failing to make monthly returns to the collector showing such facts was liable to the penalty.

The commissioner was empowered by the Act to make "all needful regulations" for carrying the act into effect. The commissioner had prescribed that wholesale dealers in oleomargarine should keep a certain book, and make monthly returns showing the oleomargarine received, from whom received, that sold and to whom sold. *Section 5* of the statute required the

wholesale dealer to keep such books as the commissioner demanded, but imposed no penalty for failure so to do.

This court, therefore, stated the question to be (686):

"The question, therefore, is whether a wholesale dealer in oleomargarine, who omits to keep the books, or to render the returns prescribed by the regulation made under the authority of Sec. 20 of the Act, is liable to the penalty prescribed by Section 18, as having omitted or failed to do a thing 'required by law in the carrying on or conducting of his business' within the meaning of Section 18."

This court said:

"Section 20 of the Act in question would be fully carried out by making regulations of the character of those provided for in Section 161 and Section 251 of the Revised Statutes, without extending the provision of Section 18 so as to make a criminal offense, as a neglect to do a thing 'required by law' of a neglect to do a thing required only by a regulation of the Commissioner of Internal Revenue."

After reviewing *Morrill* v. *Jones*, *supra*, this court said (687):

"Much more does this principle apply to a case where it is sought substantially to prescribe a criminal offense by the regulation of a department. It is a principle of criminal law that an offense which may be the subject of criminal procedure is an act committed or omitted 'in violation of a public law, either forbidding or commanding it.'

It would be a very dangerous principle to hold that a thing prescribed by the Commissioner of Internal Revenue, as a needful regulation under the Oleomargarine Act, for carrying it into effect, could be considered as a thing 'required by law' in the carrying on or conducting of the business of a wholesale dealer in oleomargarine, in such manner as to become a crim-

inal offense punishable under Section 18 of the Act; particularly when the same Act, in Section 5, requires a manufacturer of the article to keep such books and render such returns as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may, by regulation, require, and does not impose, in that section or elsewhere in the Act, the duty of keeping such books and rendering such returns upon a wholesale dealer in the article.

It is necessary that a sufficient statutory authority should exist for declaring any act or omission a criminal offense; and we do not think that the statutory authority in the present case is sufficient. If Congress intended to make it an offense for the wholesale dealers in oleomargarine to omit to keep books and render returns as required by regulations to be made by the Commissioner of Internal Revenue, it would have done so distinctly, in connection with an enactment such as that above recited, made in Section 41 of the Act of October 1, 1890.

"Regulations prescribed by the President and by the heads of departments, under authority granted by Congress, may be regulations prescribed by law, so as to lawfully support acts done under them and in accordance with them, and may thus have, in a proper sense, the force of law; but it does not follow that a thing required by them is a thing so required by law as to make the neglect to do the thing a criminal offense in a citizen, where a statute does not distinctly make the neglect in question a criminal offense."

In *United States* v. *Waters*, 133 U. S., 208, 213 (1890), this court held that the Attorney General had no power to revise the ruling of a court in making an allowance of a fee to a district attorney.

In *Ex parte Kollock*, 165 U. S., 526, 538, a case arising under the aforesaid Act of August 2, 1886, this court found that the offense of which Kollock was accused was fully defined by the statute, and that the regulation by the commissioner was in

execution of, or supplementary to, but not in conflict with the law itself. The case of *U. S.* v. *Eaton*, above cited, was reviewed and distinguished.

Both in the State and Federal courts a great number of decisions may be found to the same effect. Reference will be made to a few of them which bear more immediately upon the matter in hand.

In *U. S.* v. *Blasingame*, 116 Fed. Rep., 654 (1900), it was held that Congress had no power to confer upon the Secretary of the Interior authority to make rules and regulations for the protection of forest reservations, the violation of which would be a criminal offense, under the Act of June 4, 1897. (30 Stat. L., 11, 35; 2 U. S. Comp. St. 1901, p. 1540), citing decisions of the Supreme Court of the United States already referred to and also the following interesting series of California decisions:

People v. *Parks*, 58 Cal., 624, 643 (1881).
Ex parte Cox, 63 Cal., 21 (1883).
Board of Harbor Commissioners v. *Excelsior Redwood Co.*, 88 Cal., 491, 493 (1890), 26 Pac. Rep., 375; 22 Am. St. Rep., 321.

The case of *Ex parte Cox*, which relates to a quarantine for the protection of vineyards, is closely analogous to the case at bar.

In *Dent* v. *U. S.*, 71 Pac. Rep., 920 (1903), the Supreme Court of Arizona in an elaborate opinion also held the Act of June 4, 1897, invalid in so far as it might be considered to authorize the Secretary of the Interior to make certain acts criminal offenses which would not be otherwise punishable as such.

Under the Act of June 4, 1897, however, regulations by the Secretary of the Interior have been sustained in so far as to permit the United States to prevent by injunction pasturing of sheep on a forest reservation without the permission of the Secretary. *U. S.* v. *Dastervignes et al.*, 118 Fed. Rep., 199 (1902), same case on appeal to the Circuit Court of Appeals for the 9th Circuit, 122 Fed. Rep., 30 (1903). Such a bill might very well be maintained upon the basis of the proprietary rights of the United States and its power as representing the public to prevent irreparable trespass. Compare *In re Debs*, 158 U. S., 564 (1895).

In *State ex rel. Adams* v. *Burdge et al.*, 95 Wis., 390 (1897), 37 L. R. A., 157, it was held that the legislature cannot delegate to the State Board of Health power to enact a regulation excluding from the public schools children who have not been vaccinated.

A comparatively recent decision is *King* v. *Concordia Fire Ins. Co.*, 103 N. W. Rep., 616 (Mich., 1905), in which it is held that the legislature cannot delegate to an insurance commission authority to draft a form of standard fire insurance policy, the use of which should be obligatory under penalty. An interesting feature of this case is that apparently no counsel could be found who would maintain the constitutionality of the law.

The foregoing review of the principles enunciated by this court indicates clearly the invalidity of the regulations made by the Secretary of Agriculture in the premises. The Act of May 29, 1884, 23 Stat., 31, 3 U. S. Comp. Stat., 1901, p. 3183, so far as it regulated this subject comprised Secs. 4 to 9, inclusive.

The Act of February 2, 1903, 32 Stat., 791, Supplement 1905 to U. S. Comp. Stat. aforesaid, p. 613, confers upon the Secretary of Agriculture the powers conferred by Secs. 4 and 5 of the aforesaid Act of May 29, 1884, upon the Secretary of the Treasury.

Secs. 4 and 5, of the Act of May 29, 1884, aforesaid, read:

"Sec. 4. That in order to promote the exportation of live stock from the United States the Commissioner of Agriculture shall make special investigation as to the existence of pleuro-pneumonia, or any contagious, infectious or communicable disease, along the dividing-lines between the United States and foreign countries, and along the lines of transportation from all parts of the United States to ports from which live stock are exported, and make report of the results of such investigation to the Secretary of the Treasury, who shall, from time to time, establish such regulations concerning the exportation and transportation of live stock as the results of said investigations may require.

Sec. 5. That to prevent the exportation from any port of the United States to any port in a foreign country of live stock affected with any contagious, infectious, or communicable disease, and especially pleuro-pneumonia, the Secretary of the Treasury be, and he is hereby, authorized to take such steps and adopt such measures, not inconsistent with the provisions of this act, as he may deem necessary."

Accordingly, it appears that by Sec. 4 the Secretary of Agriculture is to make investigations and report results to the Secretary of the Treasury, "who shall, from time to time, establish such regulations concerning the exportation and transportation of live stock as the results of said investigations may require." That by Sec. 5 he is "authorized to take such steps and adopt such measures, not inconsistent with the provisions of this act, as he may deem necessary."

If these statutes do not confer upon the Secretary of Agriculture the power *to make laws* it is difficult to see what language could confer such power. He is authorized to make such regulations "as the results of said investigations may require." He is the judge as to what regulations the results of said investigations require, and is authorized to make such regulations. A broader power to legislate is inconceivable except one that disregards the result of investigations.

There are other provisions of the Act of May 29, 1884, to-wit, *Secs. 6, 7, 8 and 9*, but these impose no limitations upon the aforesaid authority of the Secretary.

Observing the Act of February 2, 1903, we find similar liberty in the Secretary. By it he is clothed with the powers recited in Secs. 4 and 5 of the Act aforesaid, and directed, from time to time, to establish such regulations concerning exportation and transportation from any place within the United States where he may have reason to believe such diseases may exist into and through any state or territory and to foreign countries "as he may deem necessary, and all such rules and regulations shall have the force of law."

This power is limited only by discretion of the Secretary, and his regulations are declared of the same force as "law." The Secretary is, therefore, as fully and completely as a Secretary could be, empowered to enact laws, a power which, under the Constitution, is the sole province of Congress. The statutes conferring such power upon the Secretary are therefore unconstitutional.

Sec. 2 of the Act of 1903 is equally broad in its dedi-

cation of power to the Secretary. It provides authority to him "to make such regulations and to take such measures as he may deem proper" to prevent the spread of contagion, etc., and then adds certain powers of destroying property "whenever in his judgment such action is advisable in order to guard against the introduction or spread of such contagion."

In conferring power upon the Secretary of Agriculture *Congress* did not declare that transportation of cattle from any section of the country to any other section should constitute an offense, nor declare *that transportation from an infected section to one not infected should constitute an offense,* and clothe the Secretary with power to ascertain and indicate by his regulations what sections of the country were and what were not infected, but Congress clothed the Secretary with power to make the enactment if the Secretary saw fit, and Congress consequently clothed the Secretary with power to prescribe an offense involving punishment, for although by Sec. 3 of the Act of February 2, 1903, it provides the penalty for "knowingly violating the provisions of this Act, or the orders or regulations made in pursuance thereof," there are no provisions of the Act which could be violated. The Act simply clothes the Secretary with certain powers, *it declares no offense.* By the Act, Congress abdicates its legislative functions except that it fulminates penalties against those who violate the laws which the Secretary may make pursuant to the authority conferred by the Act.

Our contention is enforced by a review of Secs. 6 and 7 of the Act of May 29, 1884 (23 St. L., 33; 3 U. S. Comp. St. 1901, p. 3184).

Sec. 6 forbids a railroad company or a vessel from receiving for transportation or exporting from one state or territory to another, etc., "any live stock affected with any contagious, infectious or communicable disease," etc., and forbids any person driving such stock, etc., "knowing them to be affected" with any such disease, with certain exceptions.

Sec. 7 directs the Commissioner of Agriculture to give certain notice, by publication, of infected districts, and for the punishment of persons "who shall knowingly violate the provisions of Sec. 6 of this Act."

It is obvious, therefore, that the only statute which *Congress enacted to prohibit transportation* was confined to live stock actually "affected with any contagious, infectious or communicable disease" and to persons "knowing them to be affected" with such disease. And this the court has said in a careful discussion of the Act of May 29, 1884.

Reid v. *Colorado*, 187 U. S., 137, 150 (1902).

Congress did not assume to forbid the transportation of live stock from a district of country supposed to be infected to some other district. The commissioner assumed to enact a law supplementing the legislation of Congress so as to extend the prohibition against transportation *from cattle infected to cattle coming from a district where the infection, much or little, existed.* The secretary, therefore, did exactly what was done by the Secretary of the Treasury in *Morrill* v. *Jones,* when he confined the exemption which Congress had conferred upon live stock imported for breeding

purposes to such live stock as would improve the breeds in the United States.

Almost this very question was carefully considered in *United States* v. *Hoover,* 133 Fed. R., 950 (1904). Defendant in that case moved an instruction of "not guilty" under the Act of May 29, 1884, which was granted. The court said (p. 951):

"The Act of Congress, then, being limited to cases where the animal was affected with an infectious or communicable disease, it was not within the power or authority of the Secretary of Agriculture to extend the Act, and by an order or regulation bring within its penal provisions matters which were not criminal by the terms of the act. *United States* v. *Eaton,* 144 U. S., 677, 12 Sup. Ct., 764, 36 L. Ed., 591; *U. S.* v. *Maid* (D. C.), 116 Fed., 650; *U. S.* v. *Blasingame* (D. C.), 116 Fed., 654; *Dent* v. *United States* (Ariz.), 71 Pac., 920."

The court then considered the Act of February 2, 1903, observing that it clothed the secretary with powers contained in Sections 4 and 5 of the Act of May 29, 1884, and concluded (p. 952):

"The act nowhere attempts to prohibit the shipment of animals which are free from disease, and if Congress intended to empower the Secretary of Agriculture to make rules and regulations the violation of which alone should constitute a crime it was an unconstitutional delegation of legislative authority. While Congress may authorize the executive head of any department of government to make binding rules and regulations which are administrative in character, it cannot delegate the authority to make laws. That power is by the Constitution vested in Congress alone."

The defects in the Congressional legislation upon this subject were pointed out last March by the Presi-

dent in his message to Congress of March 1, 1905, which is as follows:

"*To the Senate and House of Representatives:*

"Your attention is respectfully called to the necessity of passing some legislation at this session which will supplement existing law intended to prevent the spread of contagious diseases of animals from one state to another or to foreign countries. Two bills, each designed to cure defects in existing law, are now pending before the Congress. The measures are practically identical. These bills have been favorably reported by the Committees on Agriculture of both branches of Congress.

"Recent decisions of the Federal courts have held that the statutory powers of the Secretary of Agriculture are inadequate to enforce regulations that prohibit the interstate movement of animals which have been exposed to contagion, but which at the time of shipment have not developed visible signs of disease.

"The right of the Secretary of Agriculture to regulate interstate movement of animals exposed but not actually diseased must be recognized if the spread of such disease from state to state and to other countries is to be prevented; and yet this right has recently been attacked in two cases filed in the Supreme Court of the United States and the Secretary of Agriculture is advised that the court may hold that the existing law is not sufficiently clear as to the steps which may be taken to accomplish this object. Each of the bills referred to in this message is accompanied by an able report which points out the necessity from a legal standpoint for the enactment of this legislation.

"I fear if no remedial legislation be granted at this session that it may be impossible to continue to enforce the necessary measures for controlling this class of diseases and that serious widespread and irreparable injury will be caused to the live stock interests of the United States. If the Federal quarantine is rendered ineffective, state will quarantine against state, each requiring compliance with differing statutes; the way to market may be blocked or ren-

dered very difficult for shipments of live stock; contagious diseases of live stock may be so disseminated through the stock yards and channels of commerce that foreign countries will restrict the export of animals and possibly meats from the United States, all of which would be disastrous to the live stock industry.

"I therefore put in an earnest plea for early action in this matter and commend to your favorable consideration the two bills proposed by the Committee on Agriculture and referred to in this message.

THEODORE ROOSEVELT.

The White House, March 1, 1905."

Congress evidently agreed with the President in his views as to the necessity of corrective legislation. This legislation will be found in the Act of March 3, 1905—33 Stat. L., 1264; U. S. Comp. Stat., 1901, Supp. 1905, p. 617. The first four sections of the Act are evidently intended to avoid the defects which in the present Acts are made manifest in the previous legislation. The Act is as follows:

"Chap. 1496.—An Act to enable the Secretary of Agriculture to establish and maintain quarantine districts, to permit and regulate the movement of cattle and other live stock therefrom, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of Agriculture is authorized and directed to quarantine any state or territory or the District of Columbia, or any portion of any state or territory or the District of Columbia, when he shall determine the fact that cattle or other live stock in such state or territory or District of Columbia are affected with any contagious, infectious or communicable disease; and the Secretary of Agriculture is directed to give written or printed notice of the establishment of quarantine to the proper officers of railroad, steamboat or other transportation companies doing business in or through any quarantined state or

territory or the District of Columbia, and to publish in such newspapers in the quarantined state or territory or the District of Columbia, as the Secretary of Agriculture may select, notice of the establishment of quarantine.

Sec. 2. That no railroad company or the owners or masters of any steam or sailing or other vessel or boat shall receive for transportation or transport from any quarantined state or territory or the District of Columbia, or from the quarantined portion of any state or territory or the District of Columbia, into any other state or territory or the District of Columbia, any cattle or other live stock, except as hereinafter provided; nor shall any person, company or corporation deliver for such transportation to any railroad company, or to the master or owner of any boat or vessel, any cattle or other live stock, except as hereinafter provided; nor shall any person, company or corporation drive on foot, or cause to be driven on foot, or transport in private conveyance or cause to be transported in private conveyance, from a quarantined state or territory or the District of Columbia, or from the quarantined portion of any state or territory or the District of Columbia, into any other state or territory or the District of Columbia, any cattle or other live stock, except as hereinafter provided.

Sec. 3. That it shall be the duty of the Secretary of Agriculture, and he is hereby authorized and directed, when the public safety will permit, to make and promulgate rules and regulations which shall permit and govern the inspection, disinfection, certification, treatment, handling, and method and manner of delivery and shipment of cattle or other live stock from a quarantined state or territory or the District of Columbia, and from the quarantined portion of any state or territory or the District of Columbia, into any other state or territory or the District of Columbia; and the Secretary of Agriculture shall give notice of such rules and regulations in the manner provided in section two of this Act for notice of establishment of quarantine.

Sec. 4. That cattle or other live stock may be moved from a quarantined state or territory or the District

of Columbia, or from the quarantined portion of any state or territory or the District of Columbia, into any other state or territory or the District of Columbia, under and in compliance with the rules and regulations of the Secretary of Agriculture, made and promulgated in pursuance of the provisions of section three of this Act; but it shall be unlawful to move, or to allow to be moved, any cattle or other live stock from any quarantined state or territory or the District of Columbia, or from the quarantined portion of any state or territory or the District of Columbia, into any other state or territory or the District of Columbia, in manner or method or under conditions other than those prescribed by the Secretary of Agriculture.

Sec. 5. That every person who forcibly assaults, resists, opposes, prevents, impedes, or interferes with any officer or employe of the Bureau of Animal Industry of the United States Department of Agriculture in the execution of his duties, or on account of the execution of his duties, shall be fined not less than one hundred dollars nor more than one thousand dollars, or be imprisoned not less than one month nor more than one year, or by both such fine and imprisonment; and every person who discharges any deadly weapon at any officer or employe of the Bureau of Animal Industry of the United States Department of Agriculture, or uses any dangerous or deadly weapon in resisting him in the execution of his duties, with intent to commit a bodily injury upon him or to deter or prevent him from discharging his duties, or on account of the performance of his duties, shall, upon conviction, be imprisoned at hard labor for a term of not more than five years or fined not to exceed one thousand dollars.

Sec. 6. That any person, company, or corporation violating the provisions of sections two or four of this Act shall be guilty of a misdemeanor, and on conviction shall be punished by a fine of not less than one hundred dollars nor more than one thousand dollars, or by imprisonment not more than one year, or by both such fine and imprisonment.

Approved March 3, 1905."

We submit that the conclusions of the Federal Court above cited, and the fears of the President and Congress were well grounded, and that the previous Acts of Congress above reviewed are invalid as applied to this case.

The recovery against plaintiff in error in this case is based solely upon the transportation by it from a point south of the quarantine line established by the State of Tennessee and adopted by the Secretary, to a point north of that line, and it is not shown that the cattle were infected when received for transportation, nor even contended that plaintiff in error had any information, or intimation of any such infection, if it existed.

We accordingly submit that no case was made against plaintiff in error in the premises.

II.

Assuming, however, for argument's sake, the power of Congress under the Constitution to clothe the Secretary of Agriculture with the legislative power which he assumed to exercise in the premises, and treating the Secretary's regulation as a law, the action of the Secretary in adopting a quarantine line, theretofore established by the State of Tennessee, extending through the state from west to east, and forbidding transportation from points south to points north of the line, is invalid because an attempt to regulate purely *infra-state* commerce. Whatever may have been the intention of the framers of the Constitution as to the delegation to the Congress of the power to regulate

all commerce among the several states, it is now well settled by this court that Congress has no power to regulate *infra-state* commerce. When, therefore, a provision of an Act of Congress in assuming to regulate commerce covers as well *infra-state* as *inter-state* commerce, the action of Congress on the two classes of commerce being inseparable, must fail *in toto*.

Where a statute is couched in terms so broad as to exceed the limits of the power of the legislature to enact it, the court will not by construction limit the statute to the scope which might constitutionally be given it by the legislature, but will hold the statute unconstitutional.

U. S. v. *Reese*, 92 U. S., 214, 221 (1875).
Trade Mark Cases, 100 U. S., 82, 98, 99 (1879).
Allen v. *Louisiana*, 103 U. S., 80, 85 (1880).
U. S. v. *Harris*, 106 U. S., 629, 641, 642 (1882).
Poindexter v. *Greenhow*, 114 U. S., 270, 305 (1884).
Spreigue v. *Thompson*, 118 U. S., 90, 94 (1885).
Baldwin v. *Franks*, 120 U. S., 678, 685, 689 (1887).
Union Sewer Pipe Co. v. *Connolly*, 184 U. S., 540, 565 (1902).
James v. *Bowman*, 190 U. S., 127, 140 (1903).
U. S. v. *JuToy*, 198 U. S., 253, 262 (1905).

The regulation being invalid, even if it had the force of an Act of Congress, would be as nugatory as if never enacted.

In *U. S.* v. *Reese*, 92 U. S., 214, 221 (1875), the question presented was whether the statute providing pun-

ishment of election inspectors refusing to count the votes of citizens because of their race, color or previous condition of servitude could be made effective. This court said that the *Fifteenth Amendment* did not clothe Congress with power to penalize every wrongful refusal to receive the vote of a qualified elector at state elections, but such authority was restricted to the rejection of such vote because of race, color or previous condition of servitude. Finding that the statute exceeded the authority of Congress, this court said (p. 220):

"It remains now to consider whether a statute, so general as this in its provisions, can be made available for the punishment of those who may be guilty of unlawful discrimination against citizens of the United States, while exercising the elective franchise, on account of their race, etc.

"There is no attempt in the sections now under consideration, to provide specifically for such an offense. If the case is provided for at all, it is because it comes under the general prohibition against any wrongful act or unlawful obstruction in this particular. We are, therefore, directly called upon to decide whether a penal statute, enacted by Congress, with its limited powers, which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate only on that which Congress may rightfully prohibit and punish. For this purpose, we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there. Each of the sections must stand as a whole, or fall

altogether. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question, then, to be determined is, whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only."

In the *Trade Mark Cases*, 100 U. S., 82, 98-99 (1879), the action of Congress would have been valid if confined to trade marks in inter-state commerce, but was broad enough to cover those employed in *infra-state* commerce; the statute was pronounced invalid. This court said (p. 98):

"It has been suggested that if Congress has power to regulate trade marks used in commerce with foreign nations and among the several states, these statutes shall be held valid in that class of cases, if no further. To this there are two objections: First, the indictments in these cases do not show that the trade marks which are wrongfully used were trade marks used in that kind of commerce. Second, while it may be true that when one part of a statute is valid and constitutional and another part is unconstitutional and void, the court may enforce the valid part where they are distinctly separable so that each can stand alone, it is not within the judicial province to give to the words used by Congress a narrower meaning than they are manifestly intended to bear in order that crimes may be punished which are not described in language that brings them within the constitutional power of that body. This precise point was decided in the case of *U. S.* v. *Reese*, 92 U. S., 214. In that case Congress had passed a statute punishing election officers who should refuse to any person lawfully entitled to do so the right to cast his vote at an election. This court was of the opinion that, as regarded the section of the statute then under consideration, Congress could only punish such denial when it was on account of race, color or previous condition of servitude."

A part of the language heretofore quoted was then quoted from *U. S.* v. *Reese.*

In *Spraigue* v. *Thompson,* 118 U. S., 90, 94 (1885), a Georgia pilot sued the owners of the steamer Saxon for pilotage claimed under state laws, and obtained judgment in the state court. Upon writ of error from this court the state law was held invalid as inconsistent with Federal laws covering the same subject. The state court had held the statute valid in part and invalid in the residue, and this Court said:

"It was held, however, by the Supreme Court of Georgia, in the case now before us, that so much of the section as makes these illegal exceptions may be disregarded, so that the rest of the section as thus read may stand, upon the principle that a separable part of a statute which is unconstitutional may be rejected, and the remainder preserved and enforced. But the insuperable difficulty with the application of that principle of construction to the present instance is, that by rejecting the exceptions intended by the legislature of Georgia the statute is made to enact what confessedly the legislature never meant. It confers upon the statute a positive operation, beyond the legislative intent and beyond what anyone can say it would have enacted in view of the illegality of the exceptions. We are, therefore, constrained to hold that the provisions of section 1512 of the Code of Georgia cannot be separated so as to reject the unconstitutional exceptions merely, and that the whole section must be treated as annulled and abrogated by section 4237 of the Revised Statutes."

This court, accordingly, concluded that the "Saxon" was not liable for pilotage under the Georgia statute.

In *Baldwin* v. *Franks,* 120 U. S., 678, 685 (1887), if the statute had been limited to punish such acts as had actually been committed, it would probably have been constitutional.

A review of the other cases cited *supra* seems unnecessary. From the language of this court above quoted it appears that even an Act of Congress covering legitimate as well as illegitimate fields of legislation in a single provision cannot be rendered effective by holding it invalid as to the field wherein Congress had no power to legislate. One reason invoked for the conclusion reached by this court is that to reject the legislation so far as it were invalid would amount to substituting legislation by the court for that by Congress. This court's words in the *Trade-mark Cases* were (100 U. S., 99):

"To limit this statute as now asked for would be to make a new law, not to enforce an old one. This is no part of our duty. If we should, in the case before us, undertake to make by judicial construction a law which Congress did not make, it is quite probable we should do what, if the matter were now before that body, it would be unwilling to do, namely, make a trade mark law which is only partial in its operation, and which would complicate the rights which parties would hold, in some instances under the Act of Congress, and in others under state law. Cooley, Const. Lim., 178, 179; *Com.* v. *Hitchings,* 5 Gray (Mass.), 482."

In *Connolly* v. *Union Sewer Pipe Co.,* 184 U. S., 540, 565 (1902), this court declared void the Illinois statute denouncing trusts except effected by farmers, and held that the exception could not be rejected in order to render the statute valid, saying:

"If the latter section be eliminated as unconstitutional, then the Act, if it stands, will apply to agriculturalists or live stock dealers. Those classes would in that way be reached and fined, when evidently the legislature intended that they should not be regarded as offending against the law even if they did combine their capital, skill, or acts in respect of their products or stock in hand, etc." (p. 565.)

In the regulation now under review the Secretary of Agriculture in the same breath forbade transportation of live stock from a point south of the quarantine line to a point north of that line in the State of Tennessee, and such transportation from the same point or points south of the line to points north thereof beyond the northern boundary of Tennessee, by the same declaration making prohibition of transportation from points south to points north of the line, whether within or without the State of Tennessee. The regulation or enactment, therefore, is invalid so far as it includes transportation wholly within the State of Tennessee from points south to points north of the line, and to render it valid this court must revise it by adding thereto the provision that the prohibition shall be limited to transportation from points south of Tennessee to points north of the quarantine line and to transportation from points south of the quarantine line to points north of the State of Tennessee, so as to confine the regulation to inter-state transportation. That such treatment of the regulation is unauthorized is settled by the decisions of this court hereinbefore cited. In the language of this court "to limit this statute as now asked for would be to make a new law, not to enforce an old one," and as further said would be to do what "it is quite probable if the matter were now before that body, it would be unwilling to do."

These cattle were transported over the Illinois Central Railroad running through Fulton, Kentucky, a city upon the boundary line between Kentucky and Tennessee. Fulton extends into both states, as this Court judicially knows. There may be stock yards in

Tennessee and stock yards in Kentucky all within the City of Fulton. It is highly improbable that the Secretary would forbid transportation to the stock yards in Fulton in Kentucky if unauthorized to forbid such transportation to stock yards in Fulton in Tennessee. At any rate, it is probable that he would refrain from forbidding the transportation in one case if unable to forbid it in the other. The principle, therefore, upon which this court condemned the enactments in the *Trade-Mark Cases* and *Connolly* v. *Union Sewer Pipe Company* is exactly applicable here. The regulation is, therefore, invalid and can afford no basis for any action against anyone under it. We, accordingly, submit that defendant in error has no cause of action under the regulation and his petition should have been dismissed by the state court.

III.

As aforesaid, the only sanction for enforcement of the Acts of Congress, or regulations of the Secretary of Agriculture aforesaid which Congress has provided is the penalty of fine and imprisonment. No private right of action for damages supposed to have been sustained by violation of the acts or regulations is conferred by Congress. None, therefore, exists. When Congress intends private action for damages to exist it so provides, as in "*The Act to Regulate Commerce.*" From the imposition of the penalty, or the declaration by Congress of a penal offense no right of action accrues. The right of action arising out of an Act of Congress is a Federal right, and must be conferred

by Congress or it does not exist. It would require, therefore, an amendment of the statute, to originate a private right of action in an individual supposed to be injured by an act forbidden by Federal statute, to clothe such individual with a right of action. It is the province of Congress to fix penalties for the commission of offenses created by Federal statutes, *and the penalties imposed are assumed to be commensurate with the gravity of the offenses.* To add to such penalties the right of private action the resulting penalties might far exceed the penalties commensurate with the gravity of the offense. The courts, therefore, will not imply for doing an act forbidden by Act of Congress a penalty not provided in the Act, by adjudicating the existence of a private right of action in favor of someone supposed to be injured by the act done.

"Where a statute creates a new right or imposes a new duty or liability, unknown to the common law, and at the same time gives a remedy for its enforcement, the remedy so prescribed is exclusive." 2 Lewis' Sutherland Stat. Const., Sec. 720, p. 1310 (1904).

The rule is so well established in the Federal courts that where a statute changing the common law prescribes a penalty no civil action can be maintained for doing the acts which give rise to the penalty, it seems unnecessary to do more than to cite some of the cases so holding.

Dollar Savings Bank v. *U. S.*, 19 Wall., 227, 238 (1873).

Haycraft v. *U. S.*, 22 Wall., 81, 98 (1874).

Pollard v. *Bailey*, 20 Wall., 520, 527 (1874).

Farmers' Nat'l Bank v. *Dearing*, 91 U. S., 29, 35 (1875).

Barnet v. *Nat. Bank*, 98 U. S., 555, 558 (1878).

Stephens v. *Monongahela Bank*, 111 U. S., 197 (1884).

Carter v. *Carusi*, 112 U. S., 478, 483 (1884).

McBrown v. *Scottish Investment Co.*, 153 U. S., 318, 325 (1894).

Central Stock Yards v. *L. & N. R. Co.*, 112 Fed. Rep., 823, 826 (1902).

Conclusion.

For the foregoing reasons we respectfully ask a reversal of the judgment of the Carlisle Circuit Court, for the State of Kentucky.

J. M. Dickinson,
Edmund F. Trabue,
Blewett Lee,
Counsel.

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Supreme Court U. S.
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JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1905.

No. [redacted].13

ILLINOIS CENTRAL RAILROAD COMPANY,
Plaintiff in Error,
vs.
J. U. McKENDREE,
Defendant in Error.

In Error to the Circuit Court of Carlisle County, State of Kentucky.

SUPPLEMENTAL BRIEF OF PLAINTIFF IN ERROR UPON THE SUGGESTION OF THE WANT OF JURISDICTION.

J. M. DICKINSON,
EDMUND F. TRABUE,
BLEWETT LEE,
Counsel for Plaintiff in Error.

THE GUNTHORP-WARREN PRINTING CO., 116 RANDOLPH STREET, CHICAGO

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 168.

ILLINOIS CENTRAL RAILROAD COMPANY, *Plaintiff in Error,* *vs.* **J. U. McKENDREE**, *Defendant in Error.*	In Error to the Circuit Court of Carlisle County, State of Kentucky.

SUPPLEMENTAL BRIEF OF PLAINTIFF IN ERROR UPON THE SUGGESTION OF THE WANT OF JURISDICTION.

In the original brief filed by the plaintiff in error in the cause, in the statement of the case, at pages 1 to 8 will be found set out at large those parts of the record which indicate the Federal questions arising thereon. At pages 17 to 21, inclusive, of said brief will be found a discussion of the question of the jurisdiction of the court. It is deemed unnecessary to repeat in this brief the matter therein contained. The attention of the court is, however, particularly called to the following passages of the pleadings.

In his amended petition at Rec., 5, the plaintiff set

up as his cause of action that the defendant had received cattle "south of the quarantine line that was established on the 14th day of March, 1903, by and under the existing quarantine laws, and that said quarantine line" (here inserting a description of the quarantine line through the body of the State of Tennessee, as set forth in Amendment No. 4 to B. A. I. Order No. 107, at Rec., 34), and transported them north of it, unloaded them at Arlington and placed them in the stock pens of the defendant adjacent to the public highway and commons where the plaintiff's cows came in contact with the infection. It was upon this petition, as appears from Rec., 5, that the defendant took issue.

At Rec., 3, it appears that the defendant in its amended answer had set up the following:

> "Further answering herein, the defendant says that the claims of the plaintiff herein asserted are based upon a certain alleged act of Congress of the United States of America, approved February 2, 1903, 'entitled an act to enable the Secretary of Agriculture to more effectually suppress and prevent the spread of contagious and infectious diseases of live stock and for other purposes,' which act is published and contained in volume 32 United States Statutes at Large, beginning at page 791 and also in a supplement to the United States Compiled Statutes issued in 1903, by the West Publishing Company, St. Paul, Minn., beginning at page 372 of said volume, and said claims are further based upon certain alleged regulations adopted and promulgated by the Secretary of Agriculture on March 13, 1903, pursuant to the authority attempted to be conferred upon him by said alleged act of Congress above mentioned approved February 2, 1903.
>
> "The defendant says that said act of Congress

hereinbefore mentioned and said regulations adopted by the Secretary of Agriculture as hereinbefore stated are each and all of them repugnant to and in contravention of the Constitution of the United States of America and is in excess of the powers of Congress and of the Secretary of Agriculture under the Constitution of the United States, and they are each and all, therefore, unconstitutional and void, and under the Constitution of the United States this defendant has the right, privilege and immunity of being exempt from the assertion or prosecution of any claims against it based upon or arising under such act of Congress or said regulations or any of them, and this defendant as permitted by section 709 of the Revised Statutes of the United States hereby specially sets up and claims and pleads in defense of this action the right and privilege and immunity which is secured to it by the Constitution of the United States to be exempt from all suits and prosecutions and all claims against it based upon or arising under such unconstitutional and void act of Congress and regulations adopted or promulgated by the Secretary of Agriculture."

At Rec., 6, it appears that the plaintiff's demurrer to this answer was sustained, to which the defendant excepted.

The court will observe that by the amended answer, to which a demurrer was sustained below, the defendant specially claimed that the Act of Congress of February 2, 1903, was void, and that the regulations adopted by the Secretary of Agriculture upon which the plaintiff based his claim were void, and that the defendant was entitled to be exempt from suit based upon the Act and upon the regulations adopted by the Secretary of Agriculture. From the certificate of the presiding judge at the trial (Rec., 10), it appears that the objection to the regulations of the Secretary of

Agriculture was based upon the grounds, not only that they were in excess of the powers which could be conferred by Congress under the Constitution, but that they were in excess of the powers actually conferred, also that under the statute no right of action arose to the plaintiff, and that under the statute the defendant was exempt from civil liability. When the court below refused to instruct the jury to find for the defendant (Rec., 8) it not only denied the immunity of the defendant from interference with its right to pursue interstate commerce undisturbed except according to law, but also its immunity from civil suit under the Act of February 2, 1903. The case involves not only the Federal questions arising under the commerce clause as to whether or not the particular regulation enforced against the defendant was a regulation of interstate commerce, but it also involves the entirely distinct Federal question whether or not the powers of Congress can be delegated for any purpose, depending not upon the commerce clause in particular, but upon the general frame of the first Article of the Constitution, more particularly perhaps Article 1, Section 1:

> "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

The case at bar is one of that comparatively rare class where a decision either way necessarily involves a decision against a claim to a Federal right, so that either party, if defeated, would have the right to appeal to the Supreme Court of the United States. Each of the contending parties based his right upon the provision of the Act of February 2, 1903, and claimed a right, privilege or immunity thereunder, the plaintiff

claiming that it gave him a right of action against the defendant, the defendant claiming that it gave him an immunity from civil suit, and also that the Constitution gave him immunity from liability.

Thus, in the case of *Matthews* v. *Zane*, 4 Cranch, 382 (1808), both parties claimed title to land under the same act of Congress. The Reporter says:

> "The court at first hesitated as to the jurisdiction but upon consultation together and deliberation,
>
> "Marshall, Ch. J., declared it to be the opinion of a majority of the judges, that this court has jurisdiction."

In *Buel* v. *Van Ness*, 8 Wheaton, 312, 324 (1823), where Van Ness succeeded Buel as collector of customs and the suit involved the question which of them was entitled to a certain forfeiture under a certain act of Congress, the court considered the question as settled by *Matthews* v. *Zane*, saying:

> "The literal meaning of the terms of the 25th section (of the Judiciary Act) embraces the plaintiff's case; as it would also have embraced that of the defendant, had the state court decided against his claim under the same act."

So in *Palmer* v. *Hussey*, 119 U. S., 96 (1886), where the defendant claimed the protection of a discharge in bankruptcy and the plaintiff claimed that the discharge was not applicable because the offense arose from the breach of a fiduciary relation, and the Court of Appeals of New York had sustained the contention of Hussey, the jurisdiction of this court to entertain an appeal by Palmer was sustained.

Likewise, in *McCormick* v. *Market Bank*, 165 U. S., 538, 545 (1897), the question arose whether under the

national bank act the execution of a lease of premises before a certificate had been obtained authorizing the corporation to do a banking business was incidental and necessarily preliminary to its organization and thus falling within the exception to the statute forbidding the transaction of business. The Supreme Court of Illinois held that the contract of lease was not of this incidental and necessarily preliminary character. Mr. Justice Gray, in delivering the opinion of the court, after pointing out that had the decision been the other way the defendant would have been entitled to a writ of error, adds:

> "It does not, however, follow that the plaintiff is not entitled to a review by this court of the judgment, so far as it was against him."

The court further said:

> "The case, in this particular, is analogous to those arising under the provision of the Bankrupt Act, that a bankrupt who had in all things conformed to his duty under the act should receive a discharge from all his debts, with certain exceptions, among which were debts created by his fraud or embezzlement, or by his defalcation as a public officer, or while acting in a fiduciary character. Rev. Stat., Secs. 5114, 5117. In *Strader* v. *Baldwin*, 9 How., 261, indeed, under like provision of a former bankrupt act, where a bankrupt, being sued upon a debt, pleaded his discharge, and the plaintiff replied that the debt was contracted while acting in a fiduciary capacity, and the decision of the state court was in favor of the defendant, this court held that it had no jurisdiction, because the decision below was in favor of the right set up by the defendant. But the court there failed to notice that the decision, while in favor of the right or immunity, set up by the defendant, of a discharge under the Bankrupt Act, was also against the right or immunity, set up by

the plaintiff, under the clause excepting fiduciary debts from the effect of that discharge. And the case has accordingly been overruled in similar cases arising under the recent bankrupt act, in which this court has taken jurisdiction, not only when the writ of error was sued out by the defendant; *Neal* v. *Clark*, 95 U. S., 704; but also when it was sued out by the plaintiff, because, as was said by Chief Justice Waite in delivering judgment in the latest case upon this point, the plaintiff 'specially set up and claimed an immunity, under Sec. 5117 of the Revised Statutes, from the operation of the discharge in bankruptcy, because of the fraudulent and fiduciary character of his debt, and the decision was against him.' *Hennequin* v. *Clews*, 111 U. S., 676; *Palmer* v. *Hussey*, 119 U. S., 96, 98."

In analogy to the cases which have been cited showing that where there is a Federal statute containing an exception and the parties to a suit are in dispute as to whether or not their case falls within the exception, either party has a right of appeal to this court, a corresponding situation also arises in the present suit under the immunity claimed by the appellant railroad company from interference with its actions, or being charged with liability therefor, in conducting interstate commerce. Under the Constitution of the United States the railroad company has the immunity of conducting its interstate transportation free from any interference except by authority of law. It was claimed by the plaintiff below that authority at law exists for making such interference, to-wit: the regulation of the Secretary of Agriculture and the statute purporting to authorize him to make such regulation. It was claimed by the railroad company that this statute and this regulation do not create an exception to the rule, be-

cause the statute is itself unconstitutional as an attempt to delegate the legislative power of Congress, and that the regulation of the Secretary of Agriculture is unconstitutional as attempting to exercise the legislative power of Congress, and also in attempting to draw a quarantine line through the middle of a state and forbidding the transportation of cattle from points south of this line to points north of it, and that the Secretary of Agriculture in so doing exercised powers which the statute did not delegate to him, as he was never intended to be vested with power to regulate intra-state commerce. The authorities which have been cited clearly indicate that in cases similar to this, whatever the ruling of the court below had been the party injuriously affected thereby would have the right of appeal to this court.

Under Section 709 of the Revised Statutes (4 Fed. Stat. Ann., 467) in case of a final judgment or decree in any suit in the highest court of a state, in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity, a writ of error lies to the Supreme Court of the United States. Under this clause unquestionably this writ of error could not be sustained. But it is further provided that:

> "Where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed, by either party, under such Constitution, treaty, statute, commission or authority"

a writ of error will also lie. In the case at bar the fol-

lowing rights, privileges or immunities were claimed under the Constitution and Statutes of the United States:

(1) That under the Constitution, in the absence of any state or Federal law to the contrary, the defendant had the right to transport cattle not known to be infected from one state to another without liability except for negligence.

(2) That under the Constitution the defendant was exempt from any regulations of interstate commerce made by the Secretary of Agriculture only.

(3) That under the Constitution the defendant was exempt from any regulations of interstate commerce which were essentially regulations of intra-state commerce as well.

(4) That under the statutes purporting to authorize regulation of animal industry by the Secretary of Agriculture, the defendant was not liable to any civil action for violation of the regulations of the Secretary of Agriculture.

It is quite immaterial that the state court held valid the statutes of the United States and the authority exercised thereunder which were questioned by the defendant, for the ground of appeal is that the state court decided against a right, privilege or immunity claimed under the Constitution or the statutes of the United States. For example, in *Trebilcock* v. *Wilson*, 12 Wall., 687 (1871), the Supreme Court of Iowa decided in favor of the constitutionality of the Act of Congress declaring treasury notes a legal tender, but the Supreme Court of the United States took jurisdiction and reversed the case upon the ground that under

the Constitution the appellant was entitled to have judgment entered payable in specie, as otherwise the obligation of contracts would have been impaired, deliberately overruling *Roosevelt* v. *Meyer,* 1 Wall., 512 (1863), in which this court had refused to take jurisdiction in a similar case.

In *Pennywit* v. *Eaton,* 15 Wall., 380 (1872), the Supreme Court of the United States considered it was bound to take jurisdiction of an appeal from the Supreme Court of Arkansas in a case where the latter court had sustained the validity of the appointment of a judge by the Military Governor of Louisiana, thus sustaining the validity of an authority exercised under the United States, the appellant claiming, however, that such an appointment was invalid under the clause in the Constitution relating to judicial power.

The opinion is so short that the whole will be quoted, as it is an authority which holds that the court was bound to take jurisdiction and also one in which the Federal question was not reserved with nearly so much precision as in the case at bar.

The opinion of the court is as follows:

> "The Pulaski County Court was requested to hold, that if it appeared from the evidence that the judge who presided in the court at New Orleans and rendered the judgment there, held his office by appointment from a military governor of the State of Louisiana, and under no other authority, the judgment was void. This raised, though somewhat obscurely, the question whether the court so held had any jurisdiction under the Constitution of the United States, and the question was decided against the privilege claimed under the Constitution by the defendants.
>
> "We cannot, therefore, dismiss the case for

want of jurisdiction, although we may have a very clear conviction that the decision of the state court was correct."

The jurisdiction of the court cannot be doubted in regard to the immunity set up by the appellant from regulations of commerce by the Secretary of Agriculture. The Constitution provides that the Congress shall have power to regulate commerce between the states. From this provision the court has drawn the necessary implication that at least in matters in which a national and uniform rule is possible the states have no power to regulate interstate commerce. *Robbins* v. *Shelby County Taxing District,* 120 U. S., 489, 492 (1887). By like reasoning they must with still greater force draw the conclusion that no officer of the Federal Government has power to regulate interstate commerce in such matters, but only the Congress of the United States. That the matter of cattle quarantine is one in which a national and uniform rule is possible is shown by the fact that the Secretary of Agriculture has always in his regulations undertaken to provide a quarantine for the whole country, and that the quarantine line is one crossing the entire area of the United States. The appellant claimed below the right to be free from liability predicated on any Federal regulations of interstate commerce not made by Congress, and this right or immunity was denied.

No particular form of words is needed to raise the Federal question.

Dewey v. *Des Moines,* 173 U. S., 193, 199 (1899).

Green Bay, etc., Canal Co. v. *Patten Paper Co.,* 172 U. S., 58, 67 (1898).

The record shows that "the question was necessarily involved in the decision."

Great Western Tel. Co. v. *Purdy,* 162 U. S., 329, 334-5 (1896).

In such case the certificate of the presiding judge will be looked to to ascertain whether the question was in fact raised.

Armstrong v. *The Treasurer,* 16 Peters, 281, 285 (1842).

Lawler v. *Walker,* 14 How., 149, 153 (1852).

Medberry v. *The State,* 24 How., 413, 414 (1860), also cases cited below.

The certificate of the Presiding Judge is not merely waste paper. It cannot of itself invest this court with jurisdiction, it is true; but if the record discloses the fact that a Federal question was necessarily involved, and that the judgment could not have been rendered without deciding that question, then the certificate is admissible to show that it was raised, and the attention of the court called to it before judgment, and that the court did in fact pass on it.

"While such certificate is insufficient to give us jurisdiction, where such a jurisdiction does not appear in the record, it may be resorted to, in the absence of an opinion, to show that a federal question which was otherwise raised in the record, was actually passed upon by the court."

Gulf & Ship Island R. R. Co. v. *Hewes,* 183 U. S., 66, 68 (1901).

Armstrong v. *Athens, County Treasurer,* 16 Pet., 281, 285 (1842).

Parmelee v. *Lawrence,* 11 Wall., 36, 39 (1870).

Brown v. *Atwell,* 92 U. S., 327, 330 (1875).

Gross v. *U. S. Mortgage Co.*, 108 U. S., 477, 486 (1883).

Roby v. *Colehour*, 146 U. S., 153, 160 (1892).

Dibble v. *Bellingham Bay Land Co.*, 163 U. S., 63, 70 (1896).

Yazoo & Miss. V. R. R. Co. v. *Adams*, 180 U. S., 41, 48 (1901).

In the case of *Oxley Stave Company* v. *Butler County*, 166 U. S., 648, 657, 660 (1897), Mr. Justice Harlan, in delivering the opinion of the Court, at page 657, says:

> "It is not always necessary to refer to the precise words or to the particular section of the Constitution, under which some right, title, privilege or immunity is claimed, * * * it is sufficient if it appears affirmatively from the record that a right, title, privilege or immunity is specially set up or claimed under that instrument or under the authority of the United States."

At page 660, he says:

> "If it appeared that the Supreme Court of the State regarded these general allegations as asserting such Federal right or immunity, and denied the claim so asserted, our jurisdiction could be sustained."

The record in the present case leaves no doubt upon the subject that the State Court considered the Federal rights and immunities claimed by the plaintiff in error, as having been raised, and denied the claim so asserted.

In the case of *Beer Company* v. *Massachusetts*, 97 U. S., 25, 30 (1877), Mr. Justice Bradley said, in delivering the opinion of the court:

> "It is apparent from the record that the very point now sought to be argued was made on the

trial of the cause in the Superior Court, and was passed upon, and made decisive of the controversy, and was afterwards carried by bill of exceptions to the Supreme Judicial Court, and was decided there adverse to the plaintiff in error on the very ground on which it seeks a reversal. * * * This is sufficient for our jurisdiction, and we are bound to consider the question which is thus raised."

In *Nutt* v. *Knut*, ... U. S., ... (Jan. 2, 1906), a suit against an estate for attorney's fees in collecting a claim against the United States, the defendant set up that by Section 3477 of the Revised Statutes, all assignments of unallowed claims against the United States were null and void. It was claimed that the court had no jurisdiction. The court said:

"A party who insists that a judgment cannot be rendered against him consistently with the statutes of the United States may be fairly held, within the meaning of Section 709, to assert a right and immunity under such statutes, although the statutes may not give the party himself a personal or affirmative right that could be enforced by direct suit against his adversary. Such has been the view taken in many cases where the authority of this court to review the final judgment of the state courts was involved. *Logan County Nat. Bank* v. *Townsend*, 139 U. S., 67; *Dubuque and S. C. R. Co.* v. *Richmond*, 15 Wall., 3; *Swope* v. *Leffingwell*, 105 U. S., 3; *Anderson* v. *Carkins*, 135 U. S., 483, 486; *McNulta* v. *Lochridge*, 141 U. S., 327; *Metropolitan Nat. Bank* v. *Claggett*, 141 U. S., 520; *McCormick* v. *Market Nat. Bank*, 165 U. S., 538, 546; *California Nat. Bank* v. *Kennedy*, 167 U. S., 362."

"We perceive no sufficient reason to modify the views expressed in those cases as to our jurisdiction. It is true there are some cases which, it is contended, justify a contrary view. We will not

> now stop to examine those cases narrowly, and to declare wherein they may be in conflict with the cases above cited. Suffice it to say that, upon a careful reconsideration of the whole subject, and after reviewing all the cases bearing upon the precise question of jurisdiction now before us, we reaffirm the views expressed in the above-cited cases, as demanded by the statutes regulating the jurisdiction of this court."

In regard to the matter whether or not the Federal questions were sufficiently raised in the court below, the very authorities cited by the Attorney General upon the 14th page of his "Suggestion of the Want of Jurisdiction and Brief Thereon" show that the Federal questions were sufficiently presented. In the case of *Sayward* v. *Denny,* 158 U. S., 180, cited by him, at page 184, the court say:

> "Or, at all events, it must appear from the record, by clear and necessary intendment, that the Federal question was directly involved so that the state court could not have given judgment without deciding it; that is, a definite issue as to the possession of the right must be distinctly deducible from the record before the state court can be held to have disposed of such Federal question by its decision. *Powell* v. *Brunswick County,* 150 U. S., 400, 433."

The case at bar falls within this rule.

Also, in *Marvin* v. *Trout,* 199 U. S., 212, cited by him, the court say at page 223:

> "It is well settled, in this court, that a certificate from a presiding judge of the state court, made after the decision of the case in that court, to the effect that a Federal question was considered by the court adversely to the plaintiff in error, cannot confer jurisdiction on this court, *where the record does not otherwise show it to exist;* that

> the effect of such a certificate is to make more certain and specific what is too general and indefinite in the record itself, but it is incompetent to originate the Federal question. *Dibble* v. *Bellingham Bay Land Co.*, 163 U. S., 63; *Henkel* v. *Cincinnati*, 177 U. S., 170; *Fullerton* v. *Texas*, 196 U. S., 192."

We have italicized a portion of this quotation. In the present case the record does show that the Federal questions were raised and the certificate of the trial judge shows that he ruled upon them unfavorably to the plaintiff in error.

In the case at bar the plaintiff in error set up by answer its immunities under the statute and under the Constitution.

The attention of the court is particularly directed to the way the Federal question was presented in the case of *Green Bay, etc., Co.* v. *Patten Paper Co.*, 172 U. S., 58 (1898). The second paragraph of the opinion of the court delivered by Mr. Justice Shiras, is as follows:

> "The contention that no Federal question is disclosed in the record is sufficiently disposed of, we think, by an inspection of the cross-complaint filed by the Green Bay and Mississippi Canal Company. It was therein claimed that the water power in question was created by a dam, canal and other improvements owned and operated by the United States, and that the right and title of the said Canal Company to the use of the water power so created arose under and by virtue of certain alleged and recited acts of Congress and acts of the legislature of the State of Wisconsin, relating to the improvement of Fox River as a public highway, and especially by virtue of an alleged contract between the United States and the Canal

Company, whereby the use of the surplus water created by said dam and canal was granted and reserved to the Canal Company."

Also, upon page 68, the Court speaks as follows:

"As then in its cross-complaint, the Canal Company explicitly set up and claimed, as the foundation of its alleged rights, the acts of Congress and the transactions between the United States and the Canal Company, under which the United States became the owner of the dam, canal and other improvements on the Fox River, and the Canal Company became vested with its rights in the surplus water power incidental to said works, and as, in the final judgment, the Supreme Court of Wisconsin necessarily held adversely to these claims of Federal right, we hold that the motion to dismiss for want of jurisdiction must be overruled, and that it is our duty to inspect the record in order to see whether there was error in the rulings of the court below."

The plaintiff in error ought not to be held liable in damages for transporting cattle in interstate commerce, where the judgment rests alone upon an alleged violation of a regulation made by the Secretary of Agriculture and without any proof of negligence, the effect being that in satisfaction of such judgment, the property of plaintiff in error would be taken virtually as a penalty for such alleged violation, and therefore, as a direct result of such regulation alone, and notwithstanding the claim that the taking of property under such circumstances would be unconstitutional.

If there can be no relief by writ of error from this court to a court of last resort in a state, which mulcts a railroad company in damages, alleged to have accrued by communication of contagious diseases from cattle transported in interstate commerce, the judg-

ment being predicated, not upon any proof of knowledge upon the part of the representatives of the railroad company that the cattle transported were so infected, or any negligence whatsoever in respect of such transportation upon the part of the railroad company, but alone upon the two propositions, first, that the disease was actually communicated from such cattle, and secondly, that they were transported in violation of a regulation of the Secretary of Agriculture, acting under a statute of the United States, then a case is presented of final liability, founded alone upon a United States statute, and its enforcement, by a state court, without any check upon such enforcement by the sovereign which makes such statute. The result would be that railroad companies could be made liable everywhere in state courts in respect of such interstate transportation, and that it would be carried on, although such transportation is subject to regulation alone by the federal authorities, at the peril of responsibility alone to state authorities.

For the foregoing reasons it is respectfully submitted that the writ of error is within the jurisdiction of the court and should not be dismissed.

J. M. Dickinson.
Edmund F. Trabue.
Blewett Lee.

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JAMES H. McKENNEY,
Clerk.

No. [redacted]13

In the Supreme Court of the United States.

OCTOBER TERM, 1905.

ILLINOIS CENTRAL RAILROAD COMPANY, PLAINTIFF in error,
v.
J. U. McKENDREE.

IN ERROR TO THE CIRCUIT COURT OF CARLISLE COUNTY, STATE OF KENTUCKY.

SUGGESTION OF THE WANT OF JURISDICTION AND BRIEF THEREON.

In the Supreme Court of the United States.

OCTOBER TERM, 1905.

ILLINOIS CENTRAL RAILROAD COMPANY, plaintiff in error,
v.
J. U. McKENDREE.

No. 168.

IN ERROR TO THE CIRCUIT COURT OF CARLISLE COUNTY, STATE OF KENTUCKY.

SUGGESTION OF THE WANT OF JURISDICTION AND BRIEF THEREON.

The court directed restoration of this cause to the docket and that notice be given to the Attorney-General. Having obtained permission, he now comes and respectfully suggests that the writ should be dismissed because not within the jurisdiction of the court.

BRIEF IN SUPPORT OF SUGGESTION.

STATEMENT.

In the Circuit Court of Carlisle County, Ky., the highest of the State in which a decision could be had, McKendree sued the railroad company to recover $80 damages resulting from the death of his cows, which was caused by its alleged wrongful action.

The original petition alleged (R., 1):

> * * * that on the 11th day of July, 1903, they (the railroad company) received for transportation one car or more of infected cattle, and transported them into the town of Arlington. And on the 13th day of July, 1903, unloaded said infected cattle in said town, placing them in stock pens in said town where cattle running on the commons, where they had a right to run, could and did come in contact with said infected cattle and contracted infection, Texas cow fever, and that the defendant knew or could have known with reasonable care that said cattle did have infectious germs when they unloaded said infected cattle, they having brought them from an infected district, knowing and in open conflict with well-known quarantine laws; and while said infected cattle was so held by defendant in said stock pens, the defendant's cows came in contact with said infected cattle and contracted said Texas cow fever and died.

The defendant interposed a general demurrer, claiming the facts stated were insufficient to constitute a cause of action. This was overruled (R., 2). Thereupon it answered and denied (R., 3)—

> that it brought the car load of cattle complained on from any infected district, knowing or otherwise, or that it so brought them against or in conflict with any quarantine laws, and it denies that said cattle was infected, and it denies that it knew or could have known

with the use of reasonable care, at any time, that any of said cattle had infectious germs; it has no knowledge or information sufficient to form a belief as to whether either of plaintiff's cows contracted the disease from which they died from any of said cattle, or as to whether they were worth $80 or any more than $30. And it denies that by any act of it it has damaged plaintiff in the sum of $80 or part of it.

On a later day the railroad company filed an amended answer setting up the following:

Further answering herein, the defendant says that the claims of the plaintiff herein asserted are based upon a certain alleged act of Congress of the United States of America approved February 2, 1903, entitled "An act to enable the Secretary of Agriculture to more effectually suppress and prevent spread of contagious and infectious diseases of live stock, and for other purposes," which act is published and contained in volume 32, United States Statutes at Large, beginning at page 791, and also in a supplement to the United States compiled statutes issued in 1903, by the West Publishing Company, St. Paul, Minn., beginning at page 372 of said volume, and said claims are further based upon certain alleged regulations adopted and promulgated by the Secretary of Agriculture on March 13, 1903, pursuant to the authority attempted to be conferred upon him by said alleged act of Congress above mentioned, approved February 2, 1903.

The defendant says that said act of Congress hereinbefore mentioned and said regulations

> adopted by the Secretary of Agriculture as hereinbefore stated are each and all of them repugnant to and in contravention of the Constitution of the United States of America, and is in excess of the powers of Congress and of the Secretary of Agriculture under the Constitution of the United States, and they are each and all, therefore, unconstitutional and void, and under the Constitution of the United States this defendant has the right, privilege, and immunity of being exempt from the assertion or prosecution of any claims against it based upon or arising under such act of Congress or said regulations or any of them, and this defendant, as permitted by section 709 of the Revised Statutes of the United States, hereby specially sets up and claims and pleads in defense of this action the right and privilege and immunity which is secured to it by the Constitution of the United States to be exempt from all suits and prosecutions and all claims against it based upon or arising under such unconstitutional and void act of Congress and regulations adopted or promulgated by the Secretary of Agriculture.

To the amended answer plaintiff demurred generally (R., 4), and thereafter by agreement he filed an amended petition, the affirmative allegations of which were controverted of record. (R., 4, 5.)

The amended petition said (R., 5–6):

> The defendant, Illinois Central Railroad Company, on the 13th day of June, 1903, received one car of cattle at Grand Junction, Tenn., to be transported to the town of Arlington, Ky.,

and on the 13th day of said month unloaded them in the stock pens in said town.

That the town of Arlington is a small town located on defendant's road in this, Carlisle County, and defendant's stock pens are located adjacent to the public highway and commons, and that Grand Junction, Tenn., is located on defendant's road and south of the quarantine line that was established on the 14th day of March, 1903, by and under the existing quarantine laws, and that said quarantine line, beginning on the Mississippi River, etc. [describing the course of the same through Tennessee], * * * And that the defendants received said cattle south of said quarantine line and transported them north and out of a quarantine district and south of the said quarantine line and transported them north through the State of Tennessee, into this county and State, and unloaded them in the town of Arlington and placed them in their stock pens adjacent to the public highway and commons, where plaintiff's cows came in contact with the germ of Texas cow fever that said cattle had on them when put in the pens as aforesaid; that said stock pens were suffered and permitted to remain open and exposed to cattle after the removal of said cattle without disinfecting, or any other effort to protect exposed stock, and plaintiff's cows contracted Texas cow fever from said germs produced from said cattle while in said stock pens, to the damage of plaintiff.

The demurrer to the amended answer was sustained; the cause was tried to a jury and verdict

rendered for $65, upon which judgment was entered. (R., 6, 7.)

The court refused to direct verdict for defendant, but did, upon its request, instruct the jury:

> That they can not find for plaintiff unless the cattle shipped by J. A. Jones over defendant's railroad and unloaded at Arlington had Texas fever or Texas ticks; nor can the jury find for plaintiff, although they may believe said Jones's cattle were infected by Texas fever or Texas ticks, unless they further believe that plaintiff's cattle contracted the disease from said Jones's cattle while the latter were in the pens of defendants at Arlington. (R., 8–9.)

Upon its own motion the court instructed that if the cattle shipped by defendant were infected with Texas fever, and if by reason of that disease plaintiff's cows were infected and died, he was entitled to recover their reasonable value; and further, that unless plaintiff's cows caught an infectious disease from the cattle shipped over defendant's road and died therefrom, it was entitled to a verdict notwithstanding the cattle in fact had Texas fever. (R., 9.)

The bill of exceptions (R., 24) shows the court permitted plaintiff, over objection, to introduce in evidence regulations to prevent the spread of splenetic fever among cattle, promulgated by the Department of Agriculture (Order No. 107). The reasons upon which objection was based do not appear.

The railroad company unsuccessfully asked a new trial. It maintained that the verdict was not sup-

ported by the evidence; that the court erred in sustaining the demurrer to the amended answer; that copy of the orders of quarantine issued by the Secretary of Agriculture was wrongfully admitted in evidence, "the defendant contending that the same was not properly or legally proven;" that certain evidence concerning Brown's premises was improperly allowed; that the instructions upon the court's own motion constituted error; and that a verdict for the defendant should have been directed. (R., 7, 8.)

The presiding judge certified (R., 10) that at the trial the railroad company relied and insisted upon certain rights, privileges, and immunities specially claimed by it under the Constitution of the United States, claiming and contending that the various orders promulgated by the Secretary of Agriculture were unconstitutional, null, and void, being in excess of the powers conferred, or which could be conferred, by Congress upon him; and that the act of Congress under which the Secretary assumed to promulgate such orders was unconstitutional, being in conflict with the Constitution of the United States and in excess of the powers conferred upon Congress. That the defendant contended that no right of action against it accrued by reason of such regulations or by reason of its failure to comply with the same on the ground that Congress did not attempt to give a remedy by way of a civil action for their breach; and, moreover, that the defendant specially set up and claimed if the act of Congress and the regulations were valid it had a right, privilege, and immunity

under the said act of Congress or said regulations and orders from any liability to the plaintiff in a civil action for damages occasioned by breach of the same. And that by allowing the regulations to be given in evidence and in overruling the defendant's motion for peremptory instructions the court disallowed the various contentions made in behalf of the defendant and denied the claims made by it of the rights, privileges, and immunities specially claimed, as above stated, and rendered a judgment in plaintiff's favor solely by reason of the alleged breach of said regulations and orders.

A writ of error was allowed to this court (R., 17) and six errors have been assigned (R., 12–15).

The first assignment questions the court's action in permitting introduction of the regulations of the Secretary of Agriculture.

The second questions its ruling in sustaining the demurrer to the amended answer.

The third maintains that under the act of February 2, 1903, the Secretary of Agriculture had no authority to adopt or promulgate the regulations specified, and that in holding the contrary the court denied the defendant a privilege and immunity and exemption from liability or proceeding of any character under such orders.

The fourth asserts that Congress had no power to confer upon the Secretary of Agriculture authority to adopt, promulgate, or enforce the orders and regulations specified, and that holding the contrary the

court denied the railroad's claim to a privilege, immunity, and exemption under the Constitution from liability or proceeding under any of the orders, rules, and regulations aforesaid.

The fifth sets up that the court erred in holding defendant liable by reason of alleged violation of the orders of the Secretary of Agriculture and in so doing denied its claim of exemption.

The sixth specifies as error the action of the court in rendering judgment against defendant because of its failure to comply with the regulations of the Secretary of Agriculture.

The Revised Statutes define the appellate jurisdiction of this court over State courts as follows:

> SEC. 709. A final judgment or decree in any suit in the highest court of a State, in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under, any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed, by either party, under such

Constitution, treaty, statute, commission, or authority, may be reexamined and reversed or affirmed in the Supreme Court upon a writ of error. * * *

ARGUMENT.

The only Federal questions specifically raised and passed upon during the trial of the cause below were the two in the amended answer (R., 3):

First. The act of Congress approved February 2, 1903, entitled "An act to enable the Secretary of Agriculture to more effectually suppress and prevent the spread of contagious and infectious diseases of live stock, and for other purposes" (32 Stat., 791), is in conflict with the Constitution of the United States and therefore void.

Second. The regulations adopted and promulgated by the Secretary of Agriculture on March 13, 1903 (R., 25), were also in conflict with the Constitution and void.

There is nothing in the pleadings or the certificate of the judge to show what constitutional provisions were relied upon to support the railroad's contentions.

The State court sustained the validity of both the act of Congress and the regulations of the Secretary. Section 709, Revised Statutes, does not, therefore, authorize this court to review the decision.

The railroad company in its amended answer attempted to lay ground for a review under section 709 by saying that it was entitled under the Con-

stitution to the right, privilege, and immunity of being exempt from suits and prosecutions and all claims based upon or arising under an unconstitutional or void act of Congress or regulations promulgated by an executive officer. No provision of the Constitution or laws specifically granting such privilege or immunity is pointed out, and manifestly the contention is but another way of stating that an unconstitutional enactment or regulation is without effect.

The evident purpose of Congress expressed in section 709, Revised Statutes, was not to permit this court to review the action of a State court which sustained the validity of a statute or regulation; but the contention of the railroad company would give jurisdiction wherever the constitutionality of an act was called in question, irrespective of what was decided. If the State court should hold a statute relied upon by plaintiff constitutional, then, according to the contention here put forth, the defendant would have the right to bring the cause to this court; and if the statute should be held bad, plaintiff, having relied upon it, would be entitled to bring up the cause.

In the brief for the railroad company attention is directed to section 5258, Revised Statutes, which provides:

> Every railroad company in the United States whose road is operated by steam, its successors and assigns, is hereby authorized to carry upon and over its road, boats, bridges, and

ferries, all passengers, troops, Government supplies, mails, freight, and property on their way from any State to another State, and to receive compensation therefor, and to connect with roads of other States so as to form continuous lines for the transportation of the same to the place of destination.

This statute was not relied on in the court below during the progress of the cause. It need not, therefore, be further noticed.

To give this court jurisdiction the Federal question must have been distinctly raised and passed upon by the State court. It can not originate in the certificate, assignments of error, or brief.

Allen v. *Arguimbau*, 198 U. S., 149.
Oxley Stave Co. v. *Butler County*, 166 U. S., 648.
Sayward v. *Denny*, 158 U. S., 180.
Powell v. *Brunswick County*, 150 U. S., 433.
Manning v. *French*, 133 U. S., 186.
Felix v. *Scharnweber*, 125 U. S., 54.
Railroad Co. v. *Rock*, 4 Wall., 177.
Maxwell v. *Newbold*, 18 How., 511.

Where the State court sustains the validity of an act or authority called in question its judgment can not be reviewed by this court.

McNulta v. *Lochridge*, 141 U. S., 327.
Jersey City and Bergen Rd. v. *Morgan*, 160 U. S., 288.
Baker v. *Baldwin*, 187 U. S., 61.

In *Missouri* v. *Andriano* (138 U. S., 496, 499, 500), this court said—

> The object of the present judiciary act was not to give a right to review wherever the validity of an act of Congress was drawn in question, but to prevent the courts of the several States from impairing or frittering away the authority of the Federal Government, by giving a construction to its statutes adverse to such authority. Of course, if the construction given by the State court to the act under which the right is claimed be favorable to such right, no such reason exists for a review by this court. As stated by Chief Justice Taney in the *Commonwealth Bank* v. *Griffith* (14 Peter, 56, 58), "the power given to the Supreme Court by this act of Congress was intended to protect the General Government in the free and uninterrupted exercise of the powers conferred on it by the Constitution, and to prevent any serious impediment from being thrown in its way while acting within the sphere of its legitimate authority. The right was therefore given to this court to reexamine the judgments of the State courts where the relative powers of the General and State government had been in controversy, and the decision had been in favor of the latter."

When review of the judgment of a State court is sought, the right, privilege, or immunity claimed under the Constitution must have been indicated specifically by appropriate language, or by necessary intendment, making it clear that a certain definite provision was relied on.

Maxwell v. *Newbold*, 18 How., 511, 516, 517.
Sayward v. *Denny*, 158 U. S., 180, 184.
Clarke v. *McDade*, 165 U. S., 168, 172.
Marvin v. *Trout*, 199 U. S., 212–224.

I respectfully submit that the writ of error should be dismissed.

WM. H. MOODY,
Attorney-General.

J. C. MCREYNOLDS,
Assistant Attorney-General.

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No. 13.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

ILLINOIS CENTRAL RAILROAD COMPANY, PLAINTIFF IN ERROR,

v.

J. U. McKENDREE.

IN ERROR TO THE CIRCUIT COURT OF CARLISLE COUNTY, KENTUCKY.

BRIEF FOR THE UNITED STATES.

(Filed at the suggestion of the Court.)

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

ILLINOIS CENTRAL RAILROAD COMPANY, plaintiff in error, *v.* J. U. McKENDREE. } No. 13.

IN ERROR TO THE CIRCUIT COURT OF CARLISLE COUNTY, KENTUCKY.

BRIEF FOR THE UNITED STATES.

(Filed at the suggestion of the Court.)

Before discussing the questions raised on this record as to the constitutionality of the act of Congress of February 2, 1903 (32 Stat., 791), and the regulations made by the Secretary of Agriculture in pursuance thereof, we wish to call the attention of the court to the peculiar situation disclosed by the record as to the matter of its jurisdiction on writ of error to the State court, and especially to certain phases thereof supplementary to the points made in the suggestion of want of jurisdiction heretofore filed.

In our view the amended answer (R., 3–4) discloses the only Federal questions properly to be

considered in determining the matter of jurisdiction. Those questions, as therein asserted by defendant, are: 1. The constitutionality of the act of Congress of February 2, 1903, and the regulations of the Secretary made in pursuance thereof. 2. Defendant's alleged "right and privilege and immunity which is secured to it by the Constitution of the United States to be exempt from all suits and prosecutions and all claims against it based upon or arising under such unconstitutional and void act of Congress and regulations adopted or promulgated by the Secretary of Agriculture."

As the State court sustained the validity of the act of Congress and the regulations of the Secretary, this court can not, under section 709, Revised Statutes, review its decision on the ground that that question was involved.

Assuming for the purpose of the argument that the defendant's further claim of a right, privilege, and immunity under the Constitution of the United States to be exempt from suit or liability under such alleged unconstitutional and void act and regulations properly raises a distinct question under the Constitution and laws of the United States from that made by the allegation of the unconstitutionality of the act and regulations, still this court would be without jurisdiction to review this case under section 709, Revised Statutes, because the decision of the State court was not *against* the right, privilege, and immunity so set up and claimed. The State court did not hold

that the defendant was subject to suit or liability under an act of Congress and regulations made in pursuance thereof which were unconstitutional and void. It could not have so held without holding the act and regulations unconstitutional and void, whereas it held that they were constitutional and valid. Therefore, in this case also the requirement of section 709, Revised Statutes, that the decision of the State court be *against* the right, privilege, or immunity specially set up and claimed, in order to authorize the issuance of a writ of error from this court, is not complied with.

This disposes of the only Federal questions properly raised in the State court. Another question is, however, sought to be injected into the case thru the certificate of the judge. (R., 10.) That certificate, after setting forth the defendant's claim as to the unconstitutionality of the act of Congress of February 2, 1903, and the regulations and orders of the Secretary offered in evidence in behalf of the plaintiff, recites:

> Said defendant, Illinois Central Railroad Company, further contended throughout the trial of said cause that no right of action against it accrued to the plaintiff by reason of any of the alleged regulations or orders made or promulgated by the Secretary of Agriculture, and offered in evidence upon the trial of this action, or by reason of the alleged failure on the part of the defendant to observe or to comply with any of said

regulations or orders on the ground that
said regulations or orders did not assum
attempt to give, and that the said ac
Congress did not assume or attempt to g
to the plaintiff herein or to any other in
situation a remedy by way of civil ac
against the defendant herein for its alle
breach of any of said regulations
or orders made or promulgated by the Se
tary of Agriculture, and throughout the
of said action the defendant, Illinois Cen
Railroad Company, specifically set up
claimed even if said act of Congress and
regulations and orders were valid under
Constitution and laws of the United Sta
still it had a right, privilege, or immu
under the said act of Congress or the
regulations or orders from any liabilit
the plaintiff, J. U. McKendree, in a
action for damages claimed on accoun
its alleged breach of said regulations
orders.

It will be observed that no reference is mad
the certificate of the judge to the alleged rig
the defendant, under the Constitution of
United States, to be exempt from prosecu
under an unconstitutional statute and regulati
set up in the answer. The reason for this omis
is obvious. The judge could not certify, as c
sel for defendant well knew, that the court
decided against the right so set up and clai
because the court had held the statute
regulations constitutional, and all that was

judged against defendant was that he was liable for special damages occasioned the plaintiff thru his violation of a constitutional act and regulations. If, therefore, the defendant was to obtain a review of the case by this court, it must be upon some other ground; and so we have an entirely new question injected into the case, as to the right of the defendant under said act of Congress, *assuming it to be constitutional*, to be exempt from liability to the plaintiff "in a civil action for damages claimed on account of its alleged breach of said regulations or orders." It is sought to bolster up the question so raised by like allegations in the assignments of error (R., 12–15) and in the stipulation made in this court as to the Federal questions upon which parties wish to have this case determined (R., 45, 46), the original question as to the constitutional right of the defendant to be exempt from prosecution under an unconstitutional statute and regulation, set up in the answer, being allowed to drop away entirely.

We submit that, under the decisions of this court, the alleged Federal question referred to in the certificate was not raised in the court below "at the proper time and in the proper way."

Speer v. *Illinois*, 123 U. S., 181.
Lawler v. *Walker*, 14 How., 152.
Brooks v. *Missouri*, 124 U. S., 394.
Leeper v. *Texas*, 139 U. S., 467.
Powell v. *Brunswick County*, 150 U. S., 439.

Dibble v. *Bellingham Bay Land Company*, 163 U. S., 69, 70.

Yazoo and Mississippi Railroad Co. v. *Adams*, 180 U. S., 41.

In *Powell* v. *Brunswick County* the court said (150 U. S., 439):

> The determination of the jurisdiction of this court to review the judgment of a State court under section seven hundred and nine of the Revised Statutes necessarily devolves upon the court itself, and, while the certificate of the presiding judge of the State court as to the existence of the state of case upon which our interposition may be successfully invoked is always regarded with respect, it can not confer jurisdiction upon this court to reexamine the judgment below. (*Lawler* v. *Walker*, 14 How., 149; *Railway Company* v. *Rock*, 4 Wall., 477; *Parmelee* v. *Lawrence*, 11 Wall., 36; *Caperton* v. *Bowyer*, 14 Wall., 216; *Brown* v. *Atwell*, 92 U. S., 327; *Gross* v. *United States Mortgage Co.*, 108 U. S., 477; *Feliz* v. *Scharnweber*, 125 U. S., 54; *Roby* v. *Colehour*, 146 U. S., 153.)
>
> In *Parmelee* v. *Lawrence*, Mr. Justice Nelson, speaking for the court, said: "We will add, if this court should entertain jurisdiction upon a certificate alone, in the absence of any evidence of the question in the record, then the Supreme Court of the State can give the jurisdiction in every case where the question is made by counsel in the argument. The office of the certificate, as it respects the Federal question, is to make more cer-

tain and specific what is too general and indefinite in the record, *but is incompetent to originate the question* within the true construction of the 25th section."

In *Chapin* v. *Frye* (179 U. S., 127) this court held that "where a Federal question is raised in the State court, the party who brings the case to this court can not raise here another Federal question which was not raised below."

This ruling applies not only to the question sought to be raised by the certificate of the judge, but to the question sought to be raised by the reference in the brief for defendant to section 5258, Revised Statutes.

Moreover, we submit that the alleged Federal question sought to be raised by the certificate is not substantial and real, but entirely fictitious and without color or ground to support it. The claim is that defendant has a right, *under the act of February 2, 1903*, to be exempt from liability to the plaintiff in a civil action for damages inflicted upon him as a result of its breach of the regulations and orders made in pursuance of said act, assuming the same to be valid. Upon what provision of that statute does defendant rely in support of this claim? The act in question does not refer to the matter of private rights of action at all, as the defendant in his brief (p. 45) observes. But, he says, "the only sanction for enforcement of the act of Congress, or regulations of the Secretary of Agriculture aforesaid which Congress has provided is

the penalty of fine and imprisonment." Assuredly that is true; but the plaintiff in this case was not endeavoring to enforce said act or regulations. He was only seeking to recover for the injury to his cows occasioned by the wrongful action of the defendant. The act and regulations referred to were merely relied on as proof of the defendant's negligence, plaintiff's right to bring a civil action to recover for the injury inflicted upon him by the defendant's negligence *depending entirely upon the law of the State in regard to such actions.*

It is true Congress might have provided, as it did in the act to regulate commerce, that parties injured thru a violation of the act in question might have a remedy in the courts of the United States. But, as stated, it did not deal with the subject of private rights of action at all, and left parties who might be injured thru a violation of the act to their remedies under the State or local law. This being so, there is no foundation whatever for the claim that defendant is entitled, *under the act*, to be exempt from suit or liability to the plaintiff for the damage done him thru his violation thereof.

In this connection the court's attention is called to a misleading statement in the certificate of the judge. It is there stated that "the claims of the plaintiff herein were established solely by reason of the defendant's alleged breach of said regula-

tions and orders." (R., 11.) If this were true, as thus baldly stated, there would be some foundation for defendant's claim that he is exempt under the act from a civil suit for a breach of said regulations and orders. But of course the court did not hold that the plaintiff was entitled to recover for the loss of his cows simply because the defendant had violated said regulations and orders. It required the plaintiff to prove to the satisfaction of the jury not only that the cattle brought by the defendant into the town of Arlington, Kentucky, from Grand Junction, Tennessee, in violation of said regulations and orders, were infected with Texas fever, but that his (plaintiff's) cows caught such disease from said cattle and died therefrom. This is explicitly stated in the instructions which the court gave the jury of its own motion, as well as in the instruction given them upon defendant's motion. (R., 9.) It was because only of the special damage occasioned the plaintiff by the defendant's breach of said regulations and orders that plaintiff was allowed to recover.

Defendant's alleged right, under the act of February 2, 1903, to be exempt from a civil action by an individual for special damages occasioned him by a violation of the regulations of the Secretary of Agriculture made in pursuance thereof, is therefore clearly frivolous and fictitious, and made solely for the purpose of obtaining a review by this court of the constitutional questions involved.

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In *Hamblin* v. *Western Land Co.*, 147 U. S., 531, 533, the court said:

> A real, not a fictitious, Federal question is essential to the jurisdiction of this court over the judgments of State courts. (*Millingar* v. *Hartupee*, 6 Wall., 258; *New Orleans* v. *New Orleans Water Works Co.*, 142 U. S., 79, 87.) In the latter case it was said that "the bare averment of a Federal question is not in all cases sufficient. It must not be wholly without foundation. There must be at least color of ground for such averment, otherwise a Federal question might be set up in almost any case, and the jurisdiction of this court invoked simply for the purpose of delay."

In any view, therefore, the court has no jurisdiction of this case, and the writ of error should be dismissed.

These jurisdictional defects have been thus earnestly urged upon the court, because since the passage of the act of March 3, 1905 (33 Stat., 1264), the questions arising under the act of February 2, 1903, have become academic merely, and it was thought the court would not desire to discuss them, involving as they do such important principles of constitutional law, unless it was absolutely necessary to do so.

Act of February 2, 1903, c. 349 (32 Stat., 791):

AN ACT To enable the Secretary of Agriculture to more effectually suppress and prevent the spread of contagious and infectious diseases of live stock, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in order to enable the Secretary of Agriculture to effectually suppress and extirpate contagious pleuro-pneumonia, foot and mouth disease, and other dangerous, contagious, infectious, and communicable diseases in cattle and other live stock, and to prevent the spread of such diseases, the powers conferred on the Secretary of the Treasury by sections four and five of an act entitled "An act for the establishment of a Bureau of Animal Industry, to prevent the exportation of diseased cattle, and to provide means for the suppression and extirpation of pleuro-pneumonia and other contagious diseases among domestic animals," approved May twenty-nine, eighteen hundred and eighty-four (twenty-third United States Statutes, thirty-one), are hereby conferred on the Secretary of Agriculture, to be exercised exclusively by him. He is hereby authorized and directed from time to time to establish such rules and regulations concerning the exportation and transportation of live stock from any place within the United States where he may have reason to believe

such diseases may exist into and through any State or Territory, including the Indian Territory, and into and through the District of Columbia and to foreign countries, as he may deem necessary, and all such rules and regulations shall have the force of law. Whenever any inspector or assistant inspector of the Bureau of Animal Industry shall issue a certificate showing that such officer had inspected any cattle or other live stock which were about to be shipped, driven, or transported from such locality to another, as above stated, and had found them free from Texas or splenetic fever infection, pleuro-pneumonia, foot-and-mouth disease, or any other infectious, contagious, or communicable disease, such animals, so inspected and certified, may be shipped, driven, or transported from such place into and through any State or Territory, including the Indian Territory, and into and through the District of Columbia, or they may be exported from the United States without further inspection or the exaction of fees of any kind, except such as may at any time be ordered or exacted by the Secretary of Agriculture; and all such animals shall at all times be under the control and supervision of the Bureau of Animal Industry of the Agricultural Department for the purpose of such inspection.

SEC. 2. That the Secretary of Agriculture shall have authority to make such regulations and take such measures as he may deem proper to prevent the introduction or dissemination of the contagion of any contagious, infectious, or communicable disease of animals from a foreign country into the United States, or from one State or Territory of the United States or the District of Columbia to an-

other, and to seize, quarantine, and dispose of any hay, straw, forage, or similar material, or any meats, hides, or other animal products coming from an infected foreign country to the United States, or from one State or Territory or the District of Columbia in transit to another State or Territory or the District of Columbia, whenever in his judgment such action is advisable in order to guard against the introduction or spread of such contagion.

SEC. 3. That any person, company, or corporation knowingly violating the provisions of this act or the orders or regulations made in pursuance thereof shall be guilty of a misdemeanor, and on conviction shall be punished by a fine of not less than one hundred dollars nor more than one thousand dollars, or by imprisonment not more than one year, or by both such fine and imprisonment.

Approved, February 2, 1903.

Act of May 29, 1884, c. 60 (23 Stat., 31):

AN ACT For the establishment of a Bureau of Animal Industry, to prevent the exportation of diseased cattle, and to provide means for the suppression and extirpation of pleuropneumonia and other contagious diseases among domestic animals.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Commissioner of Agriculture shall organize in his Department a Bureau of Animal Industry, and shall appoint a chief thereof, who shall be a competent veterinary sur geon, and whose duty it shall be to investigate and report upon the condition of the domestic animals of the United States, their protection and use, and

also inquire into and report the causes of contagious, infectious, and communicable diseases among them, and the means for the prevention and cure of the same, and to collect such information on these subjects as shall be valuable to the agricultural and commercial interests of the country; and the Commissioner of Agriculture is hereby authorized to employ a force sufficient for this purpose, not to exceed twenty persons at any one time. The salary of the chief of said Bureau shall be three thousand dollars per annum; and the Commissioner shall appoint a clerk for said Bureau, with a salary of one thousand five hundred dollars per annum.

SEC. 2. That the Commissioner of Agriculture is authorized to appoint two competent agents, who shall be practical stock raisers or experienced business men familiar with questions pertaining to commercial transactions in live stock, whose duty it shall be, under the instructions of the Commissioner of Agriculture, to examine and report upon the best methods of treating, transporting, and caring for animals, and the means to be adopted for the suppression and extirpation of contagious pleuro-pneumonia, and to provide against the spread of other dangerous contagious, infectious, and communicable diseases. The compensation of said agents shall be at the rate of ten dollars per diem, with all necessary expenses, while engaged in the actual performance of their duties under this act when absent from their usual place of business or residence as such agent.

SEC. 3. That it shall be the duty of the Commissioner of Agriculture to prepare such rules and regulations as may deem necessary for the speedy

and effectual suppression and extirpation of said diseases, and to certify such rules and regulations to the executive authority of each State and Territory, and invite said authorities to cooperate in the execution and enforcement of this act. Whenever the plans and methods of the Commissioner of Agriculture shall be accepted by any State or Territory in which pleuro-pneumonia or other contagious, infectious, or communicable disease is declared to exist, or such State or Territory shall have adopted plans and methods for the suppression and extirpation of said diseases, and such plans and methods shall be accepted by the Commissioner of Agriculture, and whenever the governor of a State, or other properly constituted authorities, signify their readiness to cooperate for the extinction of any contagious, infectious, or communicable disease in conformity with the provisions of this act, the Commissioner of Agriculture is hereby authorized to expend so much of the money appropriated by this act as may be necessary in such investigation, and in such disinfection and quarantine measures as may be necessary to prevent the spread of the disease from one State or Territory into another.

SEC. 4. That in order to promote the exportation of live stock from the United States, the Commissioner of Agriculture shall make special investigation as to the existence of pleuro-pneumonia, or any contagious, infectious, or communicable disease, along the dividing lines between the United States and foreign countries and along the lines of transportation from all parts of the United States to ports from which live stock are exported, and make report of the results of such investigation to

the Secretary of the Treasury, who shall, from time to time, establish such regulations concerning the exportation and transportation of live stock as the results of said investigations may require.

SEC. 5. That to prevent the exportation from any port of the United States to any port in a foreign country of live stock affected with any contagious, infectious, or communicable disease, and especially pleuro-pneumonia, the Secretary of the Treasury be, and he is hereby, authorized to take such steps and adopt such measures not inconsistent with the provisions of this act as he may deem necessary.

SEC. 6. That no railroad company within the United States, or the owners or masters of any steam or sailing or other vessel or boat, shall receive for transportation or transport, from one State or Territory to another, or from any State into the District of Columbia, or from the District into any State, any live stock affected with any contagious, infectious, or communicable disease, and especially the disease known as pleuro-pneumonia; nor shall any person, company, or corporation deliver for such transportation to any railroad company, or master or owner of any boat or vessel, any live stock, knowing them to be affected with any contagious, infectious, or communicable disease; nor shall any person, company, or corporation drive on foot or transport in private conveyance from one State or Territory to another, or from any State into the District of Columbia, or from the District into any State, any live stock, knowing them to be affected with any contagious, infectious, or communicable disease, and especially the disease known as pleuro-pneumonia: *Provided*,

That the so-called splenetic or Texas fever shall not be considered a contagious, infectious, or communicable disease within the meaning of sections four, five, six, and seven of this act, as to cattle being transported by rail to market for slaughter, when the same are unloaded only to be fed and watered in lots on the way thereto.

SEC. 7. That it shall be the duty of the Commissioner of Agriculture to notify in writing the proper officials or agents of any railroad, steamboat, or other transportation company doing business in or through any inflected locality, and by publication in such newspapers as he may select, of the existence of said contagion; and any person or persons operating any such railroad, or master or owner of any boat or vessel, or owner or custodian of or person having control over such cattle or other live stock within such infected district, who shall knowingly violate the provisions of section six of this act, shall be guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not less than one hundred nor more than five thousand dollars, or by imprisonment for not more than one year, or by both such fine and imprisonment.

10804—06——3

ARGUMENT ON THE MERITS.

I.

The act of February 2, 1903, so far as it is necessary to be considered, is constitutional and valid.

In their discussion of certain general provisions of the act in question, counsel for plaintiff in error have utterly ignored the only provisions applicable to this case, and which it is necessary to consider on this record.

After conferring upon the Secretary of Agriculture the powers conferred upon the Secretary of the Treasury by sections 4 and 5 of the act of May 29, 1884, in order to enable him "to effectually suppress and extirpate contagious pleuro-pneumonia, foot-and-mouth disease, and other dangerous, contagious, infectious, and communicable diseases in cattle and other live stock, and to prevent the spread of such diseases," section 1 of the act of February 2, 1903, provides:

> He is hereby authorized and directed from time to time to establish such rules and regulations concerning the exportation and transportation of live stock *from any place within the United States where he may have reason to believe such diseases may exist* into and through any State or Territory, including the Indian

> Territory, and into and through the District of Columbia and to foreign countries, as he may deem necessary, and all such rules and regulations shall have the force of law. Whenever any inspector or assistant inspector of the Bureau of Animal Industry shall issue a certificate showing that such officer had inspected any cattle or other live stock which were about to be shipped, driven, or transported *from such locality* to another, as above stated, and had found them free from Texas or splenetic fever infection, pleuro-pneumonia, foot-and-mouth disease, or any other infectious, contagious, or communicable disease, such animals, so inspected and certified, may be shipped, driven, or transported from such place into and thru any State or Territory, including the Indian Territory, and into and thru the District of Columbia, or they may be exported from the United States without further inspection or the exaction of fees of any kind, except such as may at any time be ordered or exacted by the Secretary of Agriculture; and all such animals shall at all times be under the control and supervision of the Bureau of Animal Industry of the Agricultural Department for the purpose of such inspection.

Here is specific authority to the Secretary of Agriculture to do as he did in B. A. I. order, No. 107, dated March 13, 1903 (R., 25), namely, designate an area within the United States which he believed to be infected, and make rules and regu-

lations concerning the transportation of cattle therefrom in interstate or foreign commerce.

There is no unconstitutional delegation of authority in this. In furtherance of the clearly exprest purpose of the act, that the spread of contagious and infectious diseases of live stock should be effectually suppressed, Congress authorized the Secretary of Agriculture to make rules and regulations concerning the transportation in interstate and foreign commerce of live stock coming from places within the United States which he believed to be infected, *and declared that such rules and regulations should have the force of law*. In necessary effect this was a prohibition upon the transportation in interstate or foreign commerce of cattle coming from such infected areas, except in accordance with the rules and regulations prescribed by the Secretary.

The act of February 2, 1903, as appears from its legislative history (36 Cong. Rec., 248, 270, 366, 664, 1264), was past immediately in response to the situation disclosed in *Reid* v. *Colorado* (187 U. S., 137), decided December 1, 1902, in which it was held, contrary to what had been supposed to be the fact, that the act of May 29, 1884, did not cover the whole subject of the transportation of live stock in interstate commerce, and therefore, notwithstanding that act, the State might legislate for its protection against the introduction of diseased cattle.

In introducing the bill Mr. Wadsworth, from the

Committee on Agriculture, submitted the following report (2d, 248):

The Committee on Agriculture, to whom was referred the bill (H. R. 15922) making an appropriation for the suppression, and to prevent the spread, of contagious and infectious diseases of live stock, and for other purposes, submit the following report:

The only object of the first section of this bill is to carry out the intention of Congress when it established the Department of Agriculture as a Department of the Government and gave it all the powers over this question of dealing with infectious diseases of cattle and other animals.

When the present Department of Agriculture was made a Cabinet position it was intended to transfer all the powers then vested in the Commissioner of Agriculture to the Secretary of Agriculture, but it seems that at that time the power to make regulations governing the transportation of animals in interstate commerce lay in the hands of the Secretary of the Treasury and not in the Commissioner of Agriculture.

This fact seems to have been overlooked when the act changing the title of the head of the Department of Agriculture from "Commissioner" to "Secretary" and making him a Cabinet officer was passed and has since been absolutely ignored and lost sight of. And during the past ten or twelve years the Secretary of Agriculture has made all rules and regulations and issued all certificates of inspection permitting the transportation of animals from infected regions,

and the legality of this action has never been questioned until lately, when the question arose in a suit brought by a shipper of cattle from Texas against the State of Colorado.

This State had passed a law ordering all cattle brought within its borders, or passing through it, to be subjected to a State inspection and a charge of fees for said inspection and the attendant labor. The shipper refused to pay, was arrested, found guilty under the laws of Colorado, sentenced to six months' imprisonment and to pay a fine of two or three hundred dollars. He sued out a writ of error in the Supreme Court of the United States, from which court an opinion was handed down December 1, 1902. The Supreme Court of the United States affirmed the supreme court of Colorado on the ground that the act creating the Bureau of Animal Industry only went to the extent of providing for the suppression and extirpation of contagious diseases of animals and did not contemplate the issue of certificates by the Secretary of Agriculture (through the Bureau of Animal Industry), and pointing out the fact that the act making a Cabinet officer of the Secretary of Agriculture did not transfer to him the authority (which was then vested in the Secretary of the Treasury) to make rules and regulations regarding the inspection and transportation of animals for interstate commerce.

As stated above, this power has been exercised for the last past ten or twelve years by the Secretary of Agriculture, who has a

force of competent men to carry on this work, while the Secretary of the Treasury has none. It is simply to carry out the evident intention of Congress that this section is inserted in this bill. It is known to all that a very serious outbreak of foot-and-mouth disease has lately occurred in two or three of the New England States.

Experience in dealing with this disease in the countries of Europe shows conclusively that there is but one way to thoroughly extirpate it, and that is by slaughter of every herd infected and every herd which has been exposed to the contagion and the thorough disinfection of stables, cars, and premises of all kinds which may have been occupied by infected animals.

Your committee considers this outbreak of foot and mouth disease (which disease has practically never existed before in this country) the most serious menace to our live-stock interests, the vast magnitude of which will be appreciated when the attention of the House is called to the fact that last year live stock to the value of $46,000,000 and animal products to the value of almost $1,000,000,000 were exported from the United States.

Should any hesitancy be shown on our part in our efforts to stamp out this disease, Europe might make it a pretext to quarantine against our animals and animal products, and the loss to our agricultural industries by such action would be beyond calculation.

> Your committee therefore urges upon the House the immediate passage of the bill.

The bill as introduced appropriated $1,000,000 for the purposes referred to, but the House eliminated the appropriation feature and considered it merely as a matter of legislation. (Id., 270.)

The bill as it past the House was reported to the Senate with an amendment of its title, necessitated by the elimination of the appropriation, and the insertion of the penalty provision as section 3. The Senate committee adopted the House report above set forth as their report, and recommended the passage of the bill as amended. (Id., 1264.)

The debate in the House (the bill past the Senate without discussion) shows that it was clearly understood that the effect of the provision of section 1, above quoted, would be to place the matter of the interstate transportation of live stock from the infected areas of the South entirely under the control of the Federal authorities, to the absolute exclusion of the State. This was unmistakably brought out by the opposition of Mr. Gaines, of Tennessee, to the provision of that section in regard to the issuance of inspection certificates by officers of the Bureau of Animal Industry, and the effect thereof, in the case of cattle about to be shipped, driven, or transported "from such locality"—that is, "from any place within the United States where he [the Secretary of Agriculture] may have reason to believe such diseases may

exist," referred to in the preceding sentence—into and through any State or Territory, etc. Mr. Gaines insisted, and the proponents of the measure agreed, that the effect would be absolutely to exclude the jurisdiction of the State over cattle so transported as long as they remained subjects of interstate commerce. (Id., 366 et seq.)

The act of February 2, 1903, having been past, therefore, in the light of the limitations of the act of May 29, 1884, so clearly set forth by Mr. Justice Harlan in his opinion in *Reid* v. *Colorado*, it seems absurd to say, as counsel for plaintiff in error contend—in the face of the provision in that act expressly authorizing the Secretary of Agriculture to establish rules and regulations concerning the exportation and transportation in interstate commerce of live stock from infected places within the United States, and giving such rules and regulations the force of law, besides adding a penalty for their violation—that Congress has not gone beyond the prohibition contained in the act of 1884 upon the transportation in interstate commerce of *diseased* cattle.

In *Reid* v. *Colorado* the court pointed out that in the act of 1884 Congress did not assume to declare that "the rules and regulations which the Department might adopt as necessary 'for the speedy and effectual suppression and extirpation of said diseases' should have in themselves, or apart from the action of the State, any binding force upon the State;" that only the power of suggestion and

cooperation was given, and that "if the authorities of any State adopted the plans and methods devised by the Department, or if the State authorities adopted measures of their own which the Department approved, then the money appropriated by Congress could be used in conducting the required investigation and in such disinfection and quarantine measures as might be necessary to prevent the spread of the diseases in question from one State or Territory into another." (187 U. S., 147, 148.)

If it was not to meet the weakness in the act of May 29, 1884, thus disclosed that Congress inserted in the act of February 2, 1903, the provision authorizing the Secretary of Agriculture to make such rules and regulations concerning the exportation and transportation in interstate commerce of live stock from infected places, and declared that such rules and regulations should have the force of law, it is difficult to see for what purpose that provision was adopted.

The power conferred upon the Secretary to make rules and regulations concerning the transportation in interstate and foreign commerce of live stock coming from infected areas within the United States is plainly only administrative. The case is well within the principle recognized and applied in *Buttfield* v. *Stranahan*, 192 U. S., 470. In that case the court sustained an act of Congress which simply forbade, in broad terms, the importation of tea inferior in purity, quality, and fitness

for consumption to the standards authorized to be fixt by the Secretary of the Treasury. The court there said (p. 496):

> The claim that the statute commits to the arbitrary discretion of the Secretary of the Treasury the determination of what teas may be imported, and therefore in effect vests that official with legislative power, is without merit. We are of opinion that the statute, when properly construed, as said by the Circuit Court of Appeals, but expresses the purpose to exclude the lowest grades of tea, whether demonstrably of inferior purity or unfit for consumption, or presumably so because of their inferior quality. This, in effect, was the fixing of a primary standard and devolved upon the Secretary of the Treasury the mere executive duty to effectuate the legislative policy declared in the statute. The case is within the principle of *Field* v. *Clark* (143 U. S., 649), where it was decided that the third section of the tariff act of October 1, 1890, was not repugnant to the Constitution as conferring legislative and treaty-making power on the President, because it authorized him to suspend the provisions of the act relating to the free introduction of sugar, molasses, coffee, tea, and hides. We may say of the legislation in this case, as was said of the legislation considered in *Field* v. *Clark*, that it does not, in any real sense, invest administrative officials with the power of legislation. Congress legislated on

> the subject as far as was reasonably practicable, and from the necessities of the case was compelled to leave to executive officials the duty of bringing about the result pointed out by the statute. To deny the power of Congress to delegate such a duty would, in effect, amount but to declaring that the plenary power vested in Congress to regulate foreign commerce could not be efficaciously exerted.

The tea act prohibited the importation of tea below the standards authorized to be fixt by the Secretary of the Treasury. The act in question in effect forbids the transportation in interstate commerce of cattle coming from an infected place within the United States contrary to the rules and regulations authorized to be prescribed by the Secretary of Agriculture. In each case Congress laid down the fundamental rule to be observed, leaving administrative details to be worked out by executive officers.

The Government does not contend that under the general authority conferred upon the Secretary of Agriculture by other provisions of the act to make "rules and regulations" and "take such measures as he may deem proper," to prevent the spread of contagious and infectious diseases of live stock, that officer was authorized, or could constitutionally be authorized, to make the regulations here in question. We rest those regulations upon the specific authority contained in the provisions

of section 1 above quoted, in which Congress indicated the plain rule of law that was to be observed, namely, that no live stock was to be transported from places within the United States ascertained by the Secretary of Agriculture to be infected with the contagious diseases referred to, except in accordance with the rules and regulations which he was authorized to prescribe.

As to our attitude in regard to the general authority conferred upon the Secretary to make "rules and regulations," etc., we respectfully refer the court to the opinion of the present incumbent of the office of Attorney-General, rendered September 26, 1904, not yet published, but which will be reported in Twenty-fifth Opinions Attorneys-General, page 249. For the convenience of the court a copy of said opinion is appended. In that opinion, it will be observed it was held that the authority conferred upon the Secretary by such general provisions "must be construed to mean simply that he make such regulations and take such measures, in his discretion, for the purpose mentioned, as are *administrative* in their nature—that is, for the enforcement of existing law;" that "it is not to be assumed that Congress intended to exceed its constitutional authority and delegate to him legislative power," the well-settled rule being "that an act of Congress should, if possible, be given an interpretation that will make it consistent with

the Constitution"—citing *Parsons* v. *Bedford* (3 Pet., 448); *Presser* v. *Illinois* (116 U. S., 269); *Hooper* v. *California* (155 U. S., 657). It was therefore held that "since a prohibition upon importation is not made or directed by the legislation referred to as a means for preventing the introduction and dissemination of the diseases of animals, the order of your Department prohibiting the importation of hay and straw from continental Europe is an exercise of legislative power and void."

In this case it will be observed the Secretary is expressly authorized and directed to make rules and regulations concerning the transportation in interstate commerce of live stock coming from places within the United States which he believes to be infected with the diseases referred to. The distinction between the two cases is obvious.

It is unnecessary to consider in this case the question raised by counsel for plaintiff in error as to whether Congress did or could, in section 3 of the act of February 2, 1903, make a violation of the rules and regulations in question a criminal offense, since this is not a criminal prosecution to enforce the penalty clause of the act. As indicated in stating the history of this legislation, section 3 was not in the bill as it passed the House, but was inserted by the Senate. Irrespective of that clause, Congress plainly could and did, in the provision in question, give to such regulations the force of law, and thereby made it unlawful, if not criminal,

to violate them. Nevertheless we think that Congress has in this case plainly enunciated its purpose that a violation of the rules and regulations prescribed by the Secretary of Agriculture in execution of the duty enforced upon him by section 1 to provide rules and regulations concerning the transportation in interstate and foreign commerce of cattle away from an infected area, should be a criminal offense, and that this was within its power. (*In re Kollock*, 165 U. S., 526.)

II.

The regulations of the Secretary of Agriculture, being confined to the subject of interstate commerce, were constitutional and valid.

It is contended that the regulations made by the Secretary of Agriculture were void because the quarantine line fixt by him was not confined to the boundaries of the State.

It is clearly immaterial whether a quarantine line established by Congress or under its authority for the regulation of interstate commerce runs thru the center of a State, so long as interstate transportation is alone intended to be affected. It may even be said that in order adequately to police and protect interstate commerce Congress may regulate and control intrastate commerce going thru the channels of interstate commerce. That question is not, however, presented in this case, since, in the provision of section 1 of the act of

February 2, 1903, above quoted, Congress only directed the Secretary of Agriculture to make rules and regulations covering the transportation in interstate commerce and foreign commerce of live stock coming from infected areas, and the regulations of the Secretary, properly construed, are also limited to interstate transportation.

In the original order of March 13, 1903 (R., 25), it will be observed, the quarantine line established by the Secretary of Agriculture was confined to State boundaries, hence interstate commerce alone was regulated thereby.

That order also contained these provisions:

> Whenever any State or Territory located above or below said quarantine line, as above designated, shall duly establish a different quarantine line, *and obtain the necessary legislation to enforce said last-mentioned line strictly and completely within the boundaries of said State or Territory*, and said last above-mentioned line *and the measures taken to enforce it* are satisfactory to the Secretary of Agriculture, he may, by a special order, temporarily adopt said State or Territory line.
>
> Said adoption will apply only to that portion of said line specified and may cease at any time the Secretary may deem it best for the interest involved, and in no instance shall said modification exist longer than the period specified in said special order; and at the expiration of such time said quarantine line shall revert without further order to the line first above described.

> Whenever any State or Territory shall establish a quarantine line for above purposes, differently located from the above-described line, *and shall obtain by legislation the necessary laws to enforce the same completely and strictly*, and shall desire a modification of the Federal quarantine line to agree with such State or Territory line, the proper authorities of such State or Territory shall forward to the Secretary of Agriculture a true map or description of such line and a copy of the laws for enforcement of same, duly authenticated and certified.

It is plain from this language that in providing for the adoption of the State quarantine line *as the Federal line* the Secretary was proceeding with a clear recognition of the fact that the regulation of intrastate commerce was not within the scope of his authority, but belonged to the State; hence the requirement that the State or Territory establishing a different quarantine line should "obtain the necessary legislation to enforce said last-mentioned line strictly and completely within the boundaries of said State or Territory," and that said line "and the measures to be taken to enforce it" should be satisfactory to the Secretary of Agriculture before it would be adopted by him as the Federal line. In other words, what the Secretary evidently had in view was this: "With the Federal quarantine line fixt at the boundary of a State, all commerce going over it is interstate, and therefore subject to the regu-

lations provided by me in accordance with the direction of Congress. But if the line be changed so as to run thru the State, part of the commerce going over such line will be local and part interstate, and the local commerce is not under my control. Unless, therefore, the State 'obtain the necessary legislation to enforce said last-mentioned line strictly and completely within the boundaries of the State,' I can not, in the interest of interstate commerce, afford to adopt it as the Federal line."

Clearly, therefore, by necessary implication from the language used, the rules and regulations prescribed by the order in question were intended to apply, in case the quarantine line should be changed so as to run thru a State, only to interstate commerce, as in the case of the original line.

This, we are advised by the Agricultural Department, was the practical interpretation put upon said order and its amendments. In the present case, it will be observed, the cattle in question were brought from Grand Junction, Tennessee, a point below the quarantine line, to Arlington, Kentucky, and hence were being transported in interstate commerce.

It would be as fair to say that by the adoption of the State quarantine line as the Federal line the Secretary intended the State should regulate interstate commerce within its limits, as that he intended thereby to control intrastate commerce.

It is of prime importance that the Federal Government be allowed to adopt a quarantine line running thru a State under a reciprocal arrangement, such as was here contemplated, as to its enforcement by the State with respect to intrastate commerce and by the Federal Government as to interstate commerce, else it will be necessary to maintain its line upon the State boundary and quarantine a larger area than may be desired. Thru the efforts made by the Agricultural Department under this and other laws the infectious diseases referred to are being confined into narrower and narrower areas, and the quarantine line is gradually moving south. It would be unfortunate, indeed, if in order effectively to reach a small infected area within a State the whole State would have to be quarantined.

It is respectfully submitted that the only provision of section 1 of the act of February 2, 1903, involved in this case, and the regulations of the Secretary made in pursuance thereof, were constitutional and valid.

WILLIAM H. MOODY,
Attorney-General.
HENRY M. HOYT,
Solicitor-General.

APPENDIX.

OPINION OF THE ATTORNEY-GENERAL REFERRED TO IN BRIEF.

DEPARTMENTAL REGULATION—DELEGATION OF LEGISLATIVE AUTHORITY.

The order of the Department of Agriculture of April 26, 1904, prohibiting the importation of hay and straw from continental Europe as a means of preventing the introduction of foot and mouth disease among cattle in the United States, is a regulation of commerce with foreign nations and an exercise of legislative power, and therefore void.

The act of February 2, 1903 (32 Stat., 791), merely authorizes the Secretary of Agriculture to make such regulations and take such measures as are administrative in their nature for the enforcement of the purposes of that law.

DEPARTMENT OF JUSTICE,
September 26, 1904.

SIR: Your letter of July 12, 1904, presents the question whether the following order promulgated by your Department is authorized by law:

[B. A. I. Order No. 124.]

"*Prohibition of the importation of hay and straw from continental Europe.*

"U. S. DEPARTMENT OF AGRICULTURE,
"OFFICE OF THE SECRETARY,
"*Washington, D. C., April 26, 1904.*

"Pursuant to the authority conferred by the act of Congress of February 2, 1903, and in further-

ance of section 8 of the regulations of March 10, 1903 (B. A. I., Order No. 106), and in consequence of the existence of foot-and-mouth disease among animals in continental Europe—

"*It is hereby ordered*, That on account of the danger to the live-stock industry of the United States through the introduction of foot-and-mouth disease by means of the contagion being carried upon straw and hay, the importation of straw and hay, the product of any country of continental Europe or which has been transported through any of said countries, be prohibited: *Provided*, That this order shall not be construed to forbid the loading upon any vessel carrying animals from said countries for importation in the United States of a sufficient quantity of hay and straw for food and bedding for such animals, said hay and straw being the product of a country not affected by this order.

(Signed) "JAMES WILSON,
"*Secretary*."

The act of February 2, 1903 (32 Stat., 791), entitled "An act to enable the Secretary of Agriculture to more effectually suppress and prevent the spread of contagious and infectious diseases of live stock, and for other purposes," provides (sec. 1):

"That in order to enable the Secretary of Agriculture to effectually suppress and extirpate contagious pleuro-pneumonia, foot-and-mouth disease, and other dangerous contagious, infectious, and communicable diseases in cattle and other live stock, and to prevent the spread of such diseases, the powers conferred on the Secretary of the Treasury by sections four and five of an act entitled

'An act for the establishment of a Bureau of Animal Industry, to prevent the exportation of diseased cattle, and to provide means for the suppression and extirpation of pleuro-pneumonia and other contagious diseases among domestic animals,' approved May twenty-ninth, eighteen hundred and eighty-four (twenty-third United States Statutes, thirty-one), are hereby conferred on the Secretary of Agriculture, to be exercised exclusively by him. He is hereby authorized and directed, from time to time, to establish such rules and regulations concerning the exportation and transportation of live stock from any place within the United States where he may have reason to believe such diseases may exist into and through any State or Territory, including the Indian Territory, and into and through the District of Columbia and to foreign countries, as he may deem necessary, and all such rules and regulations shall have the force of law. Whenever any inspector or assistant inspector of the Bureau of Animal Industry shall issue a certificate showing that such officer had inspected any cattle or other live stock which were about to be shipped, driven, or transported from such locality to another, as above stated, and had found them free from Texas or splenetic fever infection, pleuro-pneumonia, foot and mouth disease, or any other infectious, contagious, or communicable disease, such animals, so inspected and certified, may be shipped, driven, or transported from such place into and through any State or Territory, including the Indian Territory, and into and through the District of Columbia, or they may be exported from the

United States without further inspection or the exaction of fees of any kind, except such as may at any time be ordered or exacted by the Secretary of Agriculture; and all such animals shall at all times be under the control and supervision of the Bureau of Animal Industry of the Agricultural Department for the purposes of such inspection.

"SEC. 2. *That the Secretary of Agriculture shall have authority to make such regulations and take such measures as he may deem proper to prevent the introduction or dissemination of the contagion of any contagious, infectious, or communicable disease of animals from a foreign country into the United States or from one State or Territory of the United States or the District of Columbia to another, and to seize, quarantine, and dispose of any hay, straw, forage, or similar material, or any meats, hides, or other animal products coming from an infected country to the United States, or from one State or Territory or the District of Columbia in transit to another State or Territory or the District of Columbia, whenever in his judgment such action is advisable in order to guard against the introduction or spread of such contagion.*

"SEC. 3. That any person, company, or corporation knowingly violating the provisions of this act or the orders or regulations made in pursuance thereof shall be guilty of a misdemeanor, and on conviction shall be punished by a fine of not less than one hundred dollars nor more than one thousand dollars, or by imprisonment not more than one year, or by both such fine and imprisonment."

Sections 4 and 5 of the act of May 29, 1884 (23 Stat., 31), referred to in the first section of the above act, are as follows:

"SEC. 4. That in order to promote the exportation of live stock from the United States the Commissioner of Agriculture shall make special investigation as to the existence of pleuro-pneumonia, or any contagious, infectious, or communicable disease, along the dividing lines between the United States and foreign countries, and along the lines of transportation from all parts of the United States to ports from which live stock are exported, and make report of the results of such investigation to the Secretary of the Treasury, who shall, from time to time, establish such regulations concerning the exportation and transportation of live stock as the results of said investigation may require.

"SEC. 5. That to prevent the exportation from any port of the United States to any port in a foreign country of live stock affected with any contagious, infectious, or communicable disease, and especially pleuro-pneumonia, the Secretary of the Treasury be, and he is hereby, authorized to take such steps and adopt such measures, not inconsistent with the provisions of this act, as he may deem necessary."

The act of March 3, 1903 (32 Stat., 1147, 1165), making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1904, provides:

"Emergency appropriation: To enable the Secretary of Agriculture to stamp out and eradicate the foot-and-mouth disease and other contagious diseases of animals * * * five hundred thousand dollars."

This legislation undoubtedly indicates an earnest purpose on the part of Congress to suppress, and,

if possible, eradicate the foot-and-mouth and other contagious, infectious, and communicable diseases of animals, and for the accomplishment of that purpose to provide the Secretary of Agriculture with ample authority and the most abundant means.

It is fundamental in Anglo-Saxon jurisprudence, however, that legislative power can not be delegated. In *Field* v. *Clark* (143 U. S., 649–692), Mr. Justice Harlan, speaking for the court, said:

"That Congress can not delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."

It follows, therefore, that the first clause of section 2 of the act of February 2, 1903, which authorizes the Secretary of Agriculture "to make such regulations and take such measures as he may deem proper to prevent the introduction or dissemination of the contagion of any contagious, infectious or communicable disease of animals," etc., must be construed to mean simply that he may make such regulations and take such measures, in his discretion, for the purpose mentioned, as are *administrative* in their nature—that is, for the enforcement of existing law. It is not to be assumed that Congress intended to exceed its constitutional authority and delegate to him legislative power. The well-settled rule is that an act of Congress should, if possible, be given an interpretation that will make it consistent with the Constitution. (*Parsons* v. *Bedford*, 3 Pet., 448; *Presser* v. *Illinois*, 116 U. S., 269; *Hooper* v. *California*, 155 U. S., 657.)

It requires no argument to show that a prohibition upon importation is a regulation of commerce with foreign nations. The power to regulate such commerce is committed by the Constitution to Congress. Unquestionably it is legislative power, and hence can only be exercised by Congress. It follows, therefore, that since a prohibition upon importation is not made or directed by the legislation referred to as a means for preventing the introduction and dissemination of the diseases of animals, the order of your Department prohibiting the importation of hay and straw from continental Europe is an exercise of legislative power and void.

In *Field* v. *Clark*, above cited, and also in the recent case of *Buttfield* v. *Stranahan* (192 U. S., 470), the distinction between legislative and executive or administrative action in regard to foreign commerce was pointed out.

In *Field* v. *Clark* it appeared that the tariff act of October 1, 1890, authorized and directed the President to suspend the free introduction of certain articles of commerce so often as he was satisfied that the government of any country producing them, or any of them, was imposing duties or other exactions upon the agricultural or other products of the United States which, in view of the free introduction of such articles authorized by the act, he might deem to be reciprocally unequal and unreasonable. In reply to the contention that this was a delegation of legislative power to the President, the court said (143 U. S., 693):

"Legislative power was exercised when Congress declared that the suspension should take place upon a named contingency. What the President was required to do was simply in execution

of the act of Congress. It was not the making of law. He was the mere agent of the law-making power to ascertain and declare the event upon which its expressed will was to take effect."

In *Buttfield* v. *Stranahan* the doctrine of *Field* v. *Clark* was applied. By section 1 of the act of March 2, 1897, entitled "An act to prevent the importation of impure and unwholesome tea," Congress declared it unlawful, from and after a certain date, for "any person or persons or corporations to import or bring into the United States any merchandise as tea which is inferior in purity, quality, and fitness for consumption to the standards provided in section 3 of this act, and the importation of all such merchandise is hereby prohibited." Section 3 provided that the Secretary of the Treasury, upon the recommendation of the board of tea experts authorized to be appointed by the second section of the act, should "fix and establish uniform standards of purity, quality, and fitness for consumption of all kinds of tea imported into the United States."

It was contended in that case that the statute committed to the Secretary of the Treasury the determination of what teas might be imported, and therefore in effect vested that official with legislative power. But the court held that contention to be without merit, observing (192 U. S., 496):

"We are of opinion that the statute, when properly construed, * * * but expresses the purpose to exclude the lowest grades of tea, whether demonstrably of inferior purity, or unfit for consumption, or presumably so because of their inferior quality. This, in effect, was the fixing of a primary standard, and devolved upon the Secre-

tary of the Treasury the mere executive duty to effectuate the legislative policy declared in the statute. * * *

"We may say of the legislation in this case, as was said of the legislation considered in *Field* v. *Clark*, that it does not, in any real sense, invest administrative officials with the power of legislation. Congress legislated on the subject as far as was reasonably practicable, and from the necessities of the case was compelled to leave to executive officials the duty of bringing about the result pointed out by the statute."

It will be observed that in both of the above cases the rule by which the commerce in question was to be regulated was laid down by Congress. In the first case it was specifically declared that the free importation of certain articles *should be suspended* upon a certain contingency, to be ascertained by the President; in the second, that it *should be unlawful* to import any merchandise or tea below the standards directed to be fixed by the Secretary of the Treasury. In the present case Congress has not made or directed a prohibition upon importation as a means for preventing the introduction or dissemination of animal contagion. So far as importation is concerned, it has simply authorized the Secretary of Agriculture "to seize, quarantine, and dispose of" certain articles coming from an infected foreign country. To hold, therefore, that under the authority given him "to make such regulations and take such measures as he may deem proper" to effectuate the purpose specified, he is authorized to lay a prohibition upon the importation of any article of commerce—and if upon any, upon all—is to say that

he has been authorized to make and not simply t
enforce the law. There can be no doubt that th
would be a delegation of legislative power. Ce
tainly it could not be said in such case, as was sa
by the Supreme Court of the legislation referred
in the above cases, that Congress had legislate
upon the subject as far as was reasonably pract
cable, since the present statute contains no int
mation whatever that a prohibition upon import
tion was contemplated.

So in regard to the navigable waters of the Unite
States, the power of Congress over which is para
mount and, when asserted, exclusive, it has bee
held that Congress, after declaring the substanti
law, may devolve upon executive officers the du
of determining certain facts involved in its admi
istration, such as whether a bridge is a materi
obstruction to navigation. (*Wisconsin* v. *Dulut*
96 U. S., 379; *Miller* v. *Mayor of New York*, 1
U. S., 385; *Lake Shore and Michigan Raiw ay*
Ohio, 165 U. S., 365.) In an opinion rendered th
Secretary of War July 15, 1904, this question
fully considered. (25 Opin., 194.)

It will also be observed that section 3 of the a
of February 2, 1903, makes a violation of its pr
visions "or the orders or regulations made
pursuance thereof" a misdemeanor, punishab
by fine and imprisonment. This provision mak
it all the more manifest that Congress could n
have intended, even if it were constitutional
within its power, to empower the Secretary
Agriculture to make regulations concerning ma
ters not referred to in the act.

In re Kollock (165 U. S., 526) is instructive
this connection as showing the distinction betwe

a regulation authorized by law and an unauthorized regulation. The oleomargarine act of August 2, 1886, required oleomargarine to be marked, stamped, and branded as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, should prescribe, and authorized the Commissioner, with the approval of the Secretary, to make all needful regulations for carrying the act into effect. It was contended in that case that the statute was invalid because "it does not define what act done or omitted shall constitute a criminal offense," and delegates the power "to determine what acts shall be criminal" by leaving the stamps, marks, and brands to be defined by the Commissioner. But the court, speaking by Chief Justice Fuller, said (p. 533):

"We agree that the courts of the United States, in determining what constitutes an offense against the United States, must resort to the statutes of the United States, enacted in pursuance of the Constitution. But here the law required the packages to be marked and branded; prohibited the sale of packages that were not, and prescribed the punishment for sales in violation of its provisions; while the regulations simply described the particular marks, stamps, and brands to be used. The criminal offense is fully and completely defined by the act and the designation by the Commissioner of the particular marks and brands to be used was a mere matter of detail. The regulation was in execution of, or supplementary to, but not in conflict with the law itself, and was specifically authorized thereby in effectuation of the legislation which created the offense. We think the act not open to the objection urged,

and that it is disposed of by previous decisions." (*United States* v. *Bailey*, 9 Pet., 238; *United States* v. *Eaton*, 144 U. S., 677; *Caha* v. *United States*, 152 U. S., 211.)

The distinction between that and the present case is apparent. The act of February 2, 1903, neither makes nor authorizes a prohibition upon importation as a means to prevent the introduction or spread of animal contagion. The order of your Department, therefore, prohibiting the importation of hay and straw from continental Europe itself first makes such importation an offense. The statute being silent on the subject, that order certainly can not be said to be be "a mere matter of executive detail" and "specifically authorized thereby in effectuation of the legislation which created the offense."

In an opinion rendered August 11, 1899 (22 Opin., 566), in which it was held that foreign-built vessels were not entitled to be registered under the laws of the United States, Attorney-General Griggs said:

"The regulation of commerce and navigation is a subject entirely within the control of Congress, and, except in accordance with such laws as have been passed by Congress upon this subject, no authority exists in the Executive Departments to make or enforce rules or regulations relative to the registry of vessels or kindred matters connected with commerce and navigation. Congress has specifically legislated upon the subject of the registry of vessels. Section 4132 of the Revised Statutes describes the vessels that are entitled to be registered in conformity to the directions of the subsequent sections of the same title. * * *

This is a positive and specific direction as to what vessels may be and what may not be registered."

It is to be observed that in the tariff acts, the execution of which is devolved upon the Secretary of the Treasury, Congress has specifically legislated upon the subject of importation. It is hardly to be assumed, therefore, in the absence of an express declaration to that effect, that in the act under consideration Congress intended to confer upon the head of another Department such extensive authority over that branch of foreign commerce as the order prohibiting the importation of hay and straw from continental Europe would imply.

As showing the intention of Congress by the legislation in question, it is instructive to observe that section 5 of the act of May 29, 1884 (referred to in the first section of the act of February 2, 1903), provides that "to prevent the *exportation* from any port of the United States to any port in a foreign country of *live stock* affected with any contagious, infectious, or communicable disease, and especially pleuro-pneumonia, the Secretary of the Treasury be, and he is hereby, authorized to take such steps and adopt such measures, not inconsistent with the provisions of this act, as he may deem necessary." In this provision Congress specifically expresses its intention that live stock affected as described shall not be exported. The act of February 3, 1903, while indicating a general purpose on the part of Congress that the foot and mouth and other diseases of animals shall be suppressed or eradicated, contains no intimation that it intended to place or to authorize a prohibition upon the importation of any article of commerce as a means to that end.

The fact, to which my attention is particularly called, that the word "infected," which appears before the words "foreign country" in the second clause of section 2, does not appear before those words in the first clause, is of no importance, in view of the essential difference between the two clauses. The first clause, as already stated, merely authorizes the Secretary of Agriculture to make such regulations and take such measures, of an administrative nature, as he may deem proper to enforce existing law; while the second announces a rule of law in regard to the importation of certain articles which he is to enforce.

I am constrained, therefore, to hold that the order of your Department of April 28, 1904, prohibiting the importation of hay and straw from continental Europe is unauthorized by law.

Respectfully,

W. H. MOODY.

The SECRETARY OF AGRICULTURE.

O

Supreme Court of the United States.

No. 13.—October Term, 1906.

Illinois Central Railroad Company, Plaintiff in Error, *vs.* J. U. McKendree.	In error to the Circuit Court of Carlisle County, State of Kentucky.

[December 17, 1906.]

Defendant in error, plaintiff below, brought an action against the railroad company as a common carrier operating a railroad through Carlisle County, Kentucky, setting forth that the plaintiff received certain cars of infected cattle and transported them to Arlington, Carlisle County, Kentucky, where they were unloaded July 13, 1903, and placed in stock pens where the cattle of the plaintiff, rightfully running loose upon the commons, could and did come in contact with the infected cattle and contracted Texas cow fever. That the company knew or could have known, by the exercise of reasonable care, that the cattle had infectious germs when unloaded, having been brought from an infected district, in conflict with well-known quarantine laws.

A general demurrer was interposed by defendant and overruled.

After an answer of general denial the defendant filed an amended answer:

"Further answering herein, the defendant says that the claims of the plaintiff herein asserted are based upon a certain alleged act of Congress of the United States of America approved February 2, 1903, entitled 'An act to enable the Secretary of Agriculture to more effectually suppress and prevent spread of contagious and infectious diseases of live stock, and for other purposes,' which act is published and contained in volume 32, United States Statutes at Large, beginning at page 791, and also in a supplement to the United States Compiled Statutes issued in 1903, by the West Publishing Company, St. Paul, Minnesota, beginning at page 372 of said volume, and said claims are further based upon certain alleged regulations adopted and promulgated by the Secretary of Agriculture on March 13, 1903, pursuant to the authority attempted to be conferred upon him by said alleged act of Congress above mentioned, approved February 2, 1903.

"The defendant says that said act of Congress hereinbefore mentioned, and said regulations adopted by the Secretary of Agriculture, as hereinbefore stated, are each and all of them repugnant to and in contravention of the Constitution of the United States of America, and in excess of the powers of Congress and of the Secretary of Agriculture under the Constitution of the United States, and they are each and all, therefore,

unconstitutional and void, and under the Constitution of the United States this defendant has the right, privilege and immunity of being exempt from the assertion or prosecution of any claims against it based upon or arising under such act of Congress or said regulation, or any of them, and this defendant, as permitted by section 709 of the Revised Statutes of the United States, hereby specially sets up and claims and pleads in defense of this action the right and privilege and immunity which is secured to it by the Constitution of the United States, to be exempt from all suits and prosecutions and all claims against it based upon or arising under such unconstitutional and void act of Congress and regulations adopted or promulgated by the Secretary of Agriculture."

A demurrer was filed by the plaintiff to the amended answer.

The plaintiff filed an amended petition, the affirmative allegations of which were controverted.

This amended petition sets forth:

"The plaintiff, J. U. McKendree, comes, and by leave of the court amends his petition, and says that the defendant, Illinois Central Railroad Company, on the 13th day of June, 1903, received one car of cattle at Grand Junction, Tennessee, to be transported to the town of Arlington, Kentucky, and on the 13th day of said month unloaded them in the stock pens in said town.

"That the town of Arlington is a small town, located on defendant's road in this, Carlisle County, and defendant's stock pens are located adjacent to the public highway and commons, and that Grand Junction, Tennessee, is located on defendant's road and south of the quarantine line that was established on the 14th day of March, 1903, by and under the existing quarantine laws, and that said quarantine line, 'beginning on the Mississippi River at the southeast corner of the State of Missouri at the western boundary of Tennessee. [Here follows a description of the quarantine line through the body of the State of Tennessee as set forth in amendment No. 4 to B. A. I., Order No. 107.] And that the defendants received said cattle south of said quarantine line, and transported them north and out of a quarantine district, and south of the said quarantine line, and transported them north through the State of Tennessee into this county and State, and unloaded them in the town of Arlington and placed them in their stock pens adjacent to the public highway and commons, where plaintiff's cows came in contact with the germ of Texas cow fever that said cattle had on them when put in the pens as aforesaid; that said stock pens were suffered and permitted to remain open and exposed to cattle after the removal of said cattle without disinfecting, or any other effort to protect exposed stock, and plaintiff's cows contracted Texas cow fever from said germs produced from said cattle while in said stock pens, to the damage of plaintiff.

"Wherefore he prays as in his original petition."

The court sustained the demurrer to the amended answer of the defendant, and upon the issue joined the case was sent to the jury. A verdict and judgment were rendered against the railroad company and in favor of the plaintiff below.

There was no dispute as to the transportation of the cattle from a point

south of the quarantine line to a point north thereof, and the placing of them in pens at Arlington. The court, over the defendant's objection, submitted the case to the jury upon the questions of whether the transported cattle were infected, and, if so, whether the plaintiff's cattle contracted the disease from them while they were in the pens of the defendant company at Arlington.

The presiding judge of the Carlisle Circuit Court filed the following certificate:

"I, R. J. Bugg, sole presiding judge of the Circuit Court of Carlisle County, in the State of Kentucky, now and at the time of the trial of the above entitled cause, do hereby certify:

"That upon the trial of said cause the defendant, Illinois Central Railroad Company, relied for its defense upon certain rights, privileges and immunities specially claimed by it under the Constitution of the United States of America, and it insisted upon its said rights privileges and immunities throughout the trial of said action, and in the assertion of them it claimed and contended that the various regulations and orders made and promulgated by the Secretary of Agriculture, and offered in evidence on behalf of the plaintiff herein over the objections of defendant, were unconstitutional, null and void, as being in excess of the powers conferred, or which could be conferred, by act of Congress upon the Secretary of Agriculture under the Constitution of the United States of America, and that the said act of Congress approved February 2, 1903, under which the Secretary of Agriculture assumed to promulgate said orders and regulations, was itself unconstitutional, null and void, as being in conflict with the Constitution of the United States of America and in excess of the powers conferred by it upon the Congress.

"Said defendant, Illinois Central Railroad Company, further contended throughout the trial of said cause that no right of action against it accrued to the plaintiff by reason of any of the alleged regulations or orders made or promulgated by the Secretary of Agriculture, and offered in evidence upon the trial of this action, or by reason of the alleged failure on the part of the defendant to observe or to comply with any of said regulations or orders, on the ground that the said regulations or orders did not assume or attempt to give, and that the said act of Congress did not assume or attempt to give, to the plaintiff herein, or to any other in like situation, a remedy by way of civil action against the defendant herein for its alleged breach of any of said regulations or orders made or promulgated by the Secretary of Agriculture, and throughout the trial of said action the defendant, Illinois Central Railroad Company, specially set up and claimed, even if said act of Congress and said regulations and orders were valid under the Constitution and laws of the United States, still it had a right, privilege or immunity under the said act of Congress or the said regulations or orders from any liability to the plaintiff, J. U. McKendree, in a civil action for damages claimed on account of its alleged breach of said regulations or orders.

"In allowing the said regulations or orders of the Secretary of Agriculture to be given in evidence before the jury and in overruling the motion of defendant to peremptorily instruct the jury to return a verdict in its favor, the Carlisle Circuit Court disallowed the various contentions made as

above stated on behalf of the Illinois Central Railroad Company, and denied the claims made by it of the rights, privileges or immunities specially claimed by it as above stated, and held that the various claims made by it were not well founded in law under the Constitution and laws of the United States of America, and the claims of the plaintiff herein were established and a judgment in his favor rendered solely by reason of defendant's alleged breach of said regulations and orders."

The testimony tended to show that the cows of the plaintiff came in contact with cattle transported by the railroad company from a point south of the quarantine line set forth in the amended petition.

On March 13, 1903, the Secretary of Agriculture, acting under cover of the act of February 2, 1903, (32 Stat. 791,) entitled "An act to enable the Secretary of Agriculture to more effectually suppress and prevent the spread of contagious and infectious diseases of live stock, and for other purposes," established a quarantine line from west to east throughout the United States, from California to Maryland, and forbidding the transportation of cattle from points south of the line to points north of the line, except in the manner in the said order specified.

Section 9 of the order provided: "9. Violation of these regulations is punishable by a fine of not less than one hundred dollars nor more than one thousand dollars, or by imprisonment not more than one year, or by both such fine and imprisonment."

By amendment of March 14, 1904, the Secretary of Agriculture adopted as a quarantine line a line running from west to east in the State of Tennessee, from the south of which the cattle said to have infected those of the plaintiff were transported and placed in pens in a manner not in conformity with the order.

Mr. Justice DAY delivered the opinion of the Court.

The Government objects to the jurisdiction of this court to entertain the writ of error, upon the ground that no Federal question is raised within the intent and meaning of section 709 of the Revised Statutes. But we are of opinion that such questions were raised, and that we are required upon this record to review the judgment of the State court.

An inspection of the record shows that the case as made by the plaintiff below upon the amended petition was to recover damages for the infection of his cattle, because of coming in contact with cattle transported by the railroad company from a point south to a point north of the quarantine line established by the Secretary of Agriculture, in a manner violative of regulations for the transportation and keeping of cattle established by the Secretary's order.

It was not an action to recover for negligence upon common law principles. The complaint was amended in such form as to count upon

the supposed right of action accruing to the plaintiff because of the violation of the department's order. The demurrer of the plaintiff to the answer of the railroad company, setting forth the unconstitutionality of the law and the action of the Secretary thereunder, was sustained.

The certificate of the court below is given as to the extent and character of the Federal rights and immunities claimed by the defendant, and clearly states that the defendant alleged the unconstitutionality of the statute and order, that the order was in excess of the power given the Secretary, and that the statute gave no remedy in damages.

The court left the case to the jury under instructions to find a verdict for the plaintiff if it had been shown that the plaintiff's cattle were infected by coming in contact with those transported by the railroad company. It therefore necessarily decided that the act was constitutional and gave a right to recover damages for breach of the requirements of the Secretary made in pursuance thereof, and that the Secretary's order was not in excess of the statutory power given. The amended complaint, as we have said, counted upon the liability in this form. The traverse of the amended complaint made the issue. The certificate did not originate the Federal question. "It is elementary that the certificate of a court of last resort may not import a Federal question into a record, when otherwise such a question does not arise, it is equally elementary that such a certificate may serve to elucidate the determination whether a Federal question exists." (*Rector* v. *City Deposit Bank*, 200 U. S. 405–412; *Marvin* v. *Trout*, 199 U. S. 212, 223.)

This case comes within the principle decided in *Nutt* v. *Knut*, (200 U. S. 12,) in which the court said:

"A party who insists that a judgment can not be rendered against him consistently with the statutes of the United States may be fairly held, within the meaning of section 709, to assert a right and immunity under such statutes, although the statutes may not give the party himself a personal or affirmative right that could be enforced by direct suit against his adversary. Such has been the view taken in many cases where the authority of this court to review the final judgment of the State courts was involved. (*Logan County Nat. Bank* v. *Townsend*, 139 U. S. 67; *Dubuque & S. C. R. Co.* v. *Richmond*, 15 Wall. 3; *Swope* v. *Leffingwell*, 105 U. S. 3; *Anderson* v. *Carkins*, 135 U. S. 483, 486; *McNulta* v. *Lochridge*, 141 U. S. 327; *Metropolitan Nat. Bank* v. *Claggett*, 141 U. S. 520; *McCormick* v. *Market Nat. Bank*, 165 U. S. 538, 546; *California Nat. Bank* v. *Kennedy*, 167 U. S. 362.)"

To the same effect is *Rector* v. *City Deposit Bank*, (200 U. S. *supra.*)

Upon this record, read in the light of the certificate, we think the defendant raised Federal questions as to the constitutionality of the law, and, if constitutional, whether the Secretary's order was with the power therein conferred, and the right to a personal action for damages in such manner as to give this court jurisdiction of them under section 709, Rev. Statutes.

The railroad company, by the proceedings and judgment in this case, was denied the alleged Federal rights and immunities specially set up in the proceedings, in the enforcement of a statute and departmental orders averred to be beyond the constitutional power of Congress and the authority of the Secretary of Agriculture, and in the rendition of a judgment for damages in an action under the statute and order, in opposition to the insistence of the defendant that, even if constitutional, the statute did not confer such power or authorize a judgment for damages.

The constitutional objections urged to the validity of the statute of February 2, 1903 and the Secretary's order, No. 107, purporting to be made under authority of the statute, raise questions of far-reaching importance as to the power of Congress to authorize the head of an Executive Department of the Government to make orders of this character, alleged to be an attempted delegation of the legislative power solely vested by the Constitution in Congress. These questions, it is suggested by the counsel for the Government, have become academic by reason of the passage of the later act of March 3, 1905, to enable the Secretary of Agriculture to establish and maintain quarantine districts, to permit and regulate the movement of cattle and other live stock therefrom and for other purposes. (33 Stat. 1264, U. S. Comp. Stat. 1901, Supplement of 1905, p. 617.)

But we are of opinion that it is unnecessary to determine them in this case. We think the defendant was right in the contention that, if the act of February 2, 1903, was constitutional, and rightfully conferred the power upon the Secretary of Agriculture to make orders and regulations concerning interstate commerce, there was no power conferred upon the Secretary to make regulations concerning *intra*state commerce, over which Congress has no control, and concerning which we do not think this act, if it could be otherwise sustained, intended to confer power upon him. Assuming, then, for this purpose, that the Secretary was legally authorized to make orders and regulations concerning interstate commerce, we find that on March 13, 1903, he adopted, in the Order number 107, the following regulation:

"2. Whenever any State or Territory located above or below said quarantine line, as above designated, shall duly establish a different quarantine line, and obtain the necessary legislation to enforce said last mentioned line strictly and completely within the boundaries of said State or Territory, and said last above mentioned line and the measures taken to enforce it are satisfactory to the Secretary of Agriculture, he may, by a special order, temporarily adopt said State or Territory line.

"Said adoption will apply only to that portion of said line specified, and may cease at any time the Secretary may deem it best for the interests involved, and in no instance shall said modification exist longer than the period specified in said special order; and, at the expiration of such time, said quarantine line shall revert, without further order, to the line first above described.

"Whenever any State or Territory shall establish a quarantine line, for above purposes, differently located from the above described line, and shall obtain by legislation the necessary laws to enforce the same completely and strictly, and shall desire a modification of the Federal quarantine line to agree with such State or Territory line, the proper authorities of such State or Territory shall forward to the Secretary of Agriculture a true map or description of of such line and a copy of the laws for enforcement of the same, duly authenticated and certified."

And afterward, on March 14, 1903, the Secretary adopted the quarantine line agreed to be established by the State of Tennessee, and said to run about the middle of the State, and from the south of which the cattle in this case were transported, and provided:

"And whereas said quarantine line, as above set forth, is satisfactory to this Department, and legislation has been enacted by the State of Tennessee to enforce said quarantine line, therefore the above line is adopted for the State of Tennessee by this Department for the period beginning with the date of this order and ending December 31, 1903, in lieu of the quarantine line described in the order of March 13, 1903, for said area, unless otherwise ordered."

The terms of Order 107 apply to all cattle transported from the south of this line to parts of the United States north thereof. It would, therefore, include cattle transported within the State of Tennessee from the south of the line as well as those from outside that State; there is no exception in the order, and in terms it includes all cattle transported from the south of the line, whether within or without the State of Tennessee. It is urged by the Government that it was not the intention of the Secretary to make provision for intrastate commerce, as the recital of the order shows an intention to adopt the State line, when the State by its legislature has passed the necessary laws to enforce the same completely and strictly. But the order in terms applies alike to interstate and intrastate commerce. A party prosecuted for violating this order would be within its terms if the cattle were brought from the south of the line to a point north of the line within the State of Tennessee. It is true the Secretary recites that legislation has been passed by the State of Tennessee to enforce the quarantine line, but he does not limit the order to interstate commerce coming from the south of the line, and, as we have said, the order in terms covers it. We do not say that the State line might not be adopted in a proper case, in the exercise of Federal authority, if limited in its effect to interstate commerce coming from below the line, but that is not the present order, and we must deal with it as we find it. Nor have we the power to so limit the Secretary's order as to make it apply only to interstate commerce, which it is urged is all that is here involved. For aught that appears upon the face of the order, the Secretary intended it to apply to all commerce, and whether he would have made such an order, if strictly limited to interstate commerce, we have no means of knowing. The order is in terms single, and indi-

visible. In *United States* v. *Reese*, (92 U. S. 214, 221,) upon this subject, this court said:

"We are, therefore, directly called upon to decide whether a penal statute, enacted by Congress, with its limited powers, which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as make it operate only on that which Congress may rightfully prohibit and punish. For this purpose we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not there. Each of the sections must stand as a whole, or fall altogether. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question, then, to be determined is, whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only."

And the court declined to make such limitation.

And in *Trade Mark cases*, (100 U. S. 82, 99,) the court said:

"If we should, in the case before us, undertake to make by judicial construction a law which Congress did not make, it is quite probable we should do what, if the matter were now before that body, it would be unwilling to do, namely, make a trade mark law which is only partial in its operation, and which would complicate the rights which parties would hold, in some instances under the act of Congress, and in others under State law. (Cooley Const. Lim. 178, 179; *Com.* v. *Hitchings*, 5 Gray [Mass.] 482.)"

And see *United States* v. *Ju Toy*, (198 U. S. 253, 262, 263.)

We think these principles apply to the case at bar, and that this order of the Secretary, undertaking to make a stringent regulation with highly penal consequences, is single in character, and includes commerce wholly within the State, thereby exceeding any authority which Congress intended to confer upon him by the act in question, if the same is a valid enactment. We, therefore, find it unnecessary to pass upon the other questions which were thought to be involved in the case at bar.

The judgment of the State court will be reversed and the cause remanded to it for further proceedings not inconsistent with this opinion.

Mr. Justice McKenna concurs in the result.

No. 12.

Illinois Central Railroad Company, Plaintiff in Error,
vs.
T. C. Edwards.

[December 17, 1906.]

This case involves the same questions upon similar facts as No. 13, just decided. Counsel filed a written stipulation that : shall be controlled and determined by the ruling made in that case. The judgment is reversed, and cause remanded to the State court for further proceedings not inconsistent with this opinion.

Mr. Justice McKenna concurs in the result.

True copy.

Test:

Clerk Supreme Court, U. S.